REPORT DOCUMENTATION PAGE

Form Approved
OMB No. 0704-0188

1. AGENCY USE ONLY *(Leave blank)*	2. REPORT DATE	3. REPORT TYPE AND DATES COVERED
	9 Dec 96	

4. TITLE AND SUBTITLE
NPR and Reinvention: Should It "Reinvent" Federal Labor-Management Relations?

5. FUNDING NUMBERS

6. AUTHOR(S)
Richard K. Johnson

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)
Georgetown University

8. PERFORMING ORGANIZATION REPORT NUMBER
96-090

9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES)
DEPARTMENT OF THE AIR FORCE
AFIT/CI
2950 P STEET, BLDG 125
WRIGHT-PATTERSON AFB OH 45433-7765

10. SPONSORING / MONITORING AGENCY REPORT NUMBER

11. SUPPLEMENTARY NOTES

12a. DISTRIBUTION / AVAILABILITY STATEMENT
Unlimited

12b. DISTRIBUTION CODE

13. ABSTRACT *(Maximum 200 words)*

14. SUBJECT TERMS

15. NUMBER OF PAGES
74

16. PRICE CODE

17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT

GENERAL INSTRUCTIONS FOR COMPLETING SF 298

The Report Documentation Page (RDP) is used in announcing and cataloging reports. It is important that this information be consistent with the rest of the report, particularly the cover and title page. Instructions for filling in each block of the form follow. It is important to ***stay within the lines*** to meet ***optical scanning requirements***.

Block 1. Agency Use Only *(Leave blank)*.

Block 2. Report Date. Full publication date including day, month, and year, if available (e.g. 1 Jan 88). Must cite at least the year.

Block 3. Type of Report and Dates Covered. State whether report is interim, final, etc. If applicable, enter inclusive report dates (e.g. 10 Jun 87 - 30 Jun 88).

Block 4. Title and Subtitle. A title is taken from the part of the report that provides the most meaningful and complete information. When a report is prepared in more than one volume, repeat the primary title, add volume number, and include subtitle for the specific volume. On classified documents enter the title classification in parentheses.

Block 5. Funding Numbers. To include contract and grant numbers; may include program element number(s), project number(s), task number(s), and work unit number(s). Use the following labels:

C	- Contract	**PR**	- Project
G	- Grant	**TA**	- Task
PE	- Program Element	**WU**	- Work Unit Accession No.

Block 6. Author(s). Name(s) of person(s) responsible for writing the report, performing the research, or credited with the content of the report. If editor or compiler, this should follow the name(s).

Block 7. Performing Organization Name(s) and Address(es). Self-explanatory.

Block 8. Performing Organization Report Number. Enter the unique alphanumeric report number(s) assigned by the organization performing the report.

Block 9. Sponsoring/Monitoring Agency Name(s) and Address(es). Self-explanatory.

Block 10. Sponsoring/Monitoring Agency Report Number. *(If known)*

Block 11. Supplementary Notes. Enter information not included elsewhere such as: Prepared in cooperation with...; Trans. of...; To be published in.... When a report is revised, include a statement whether the new report supersedes or supplements the older report.

Block 12a. Distribution/Availability Statement. Denotes public availability or limitations. Cite any availability to the public. Enter additional limitations or special markings in all capitals (e.g. NOFORN, REL, ITAR).

- **DOD** - See DoDD 5230.24, "Distribution Statements on Technical Documents."
- **DOE** - See authorities.
- **NASA** - See Handbook NHB 2200.2.
- **NTIS** - Leave blank.

Block 12b. Distribution Code.

- **DOD** - Leave blank.
- **DOE** - Enter DOE distribution categories from the Standard Distribution for Unclassified Scientific and Technical Reports.
- **NASA** - Leave blank.
- **NTIS** - Leave blank.

Block 13. Abstract. Include a brief *(Maximum 200 words)* factual summary of the most significant information contained in the report.

Block 14. Subject Terms. Keywords or phrases identifying major subjects in the report.

Block 15. Number of Pages. Enter the total number of pages.

Block 16. Price Code. Enter appropriate price code *(NTIS only)*.

Blocks 17. - 19. Security Classifications. Self-explanatory. Enter U.S. Security Classification in accordance with U.S. Security Regulations (i.e., UNCLASSIFIED). If form contains classified information, stamp classification on the top and bottom of the page.

Block 20. Limitation of Abstract. This block must be completed to assign a limitation to the abstract. Enter either UL (unlimited) or SAR (same as report). An entry in this block is necessary if the abstract is to be limited. If blank, the abstract is assumed to be unlimited.

NPR AND REINVENTION: SHOULD IT "REINVENT" FEDERAL LABOR-MANAGEMENT RELATIONS?

Richard K. Johnson

In Fulfillment of Degree Requirements
for

Master of Laws in
Labor and Employment Law

at
Georgetown University Law Center
Washington District of Columbia
April 1996

NPR AND REINVENTION: SHOULD IT "REINVENT" FEDERAL LABOR-MANAGEMENT RELATIONS?

NPR and Reinvention: Should It "Reinvent" Federal Labor-Management Relations?

Richard K. Johnson/April 1996

No politician has ever lost an election for bashing the federal bureaucracy. To many Americans, the last two decades have been a period of uncontrolled government spending resulting in persistent budget deficits and a perception that the government is out of control and unresponsive to the public. So it is not surprising that over this same time period, three "outsider" Presidents, Carter, Reagan, and Clinton, were elected saying they were going to change the way the government "works". This paper will review the round of reform introduced by the Clinton administration, known as "reinvention" or the National Performance Review (NPR) and its impact on the Federal labor-management relationship. It will be argued that legislation governing our federal labor relationship should not be amended based on proposals introduced under NPR.

Since 1990, Congress has enacted several bills designed to improve the management of the federal government. In 1993, President Clinton initiated the National Performance Review (NPR) in order to "reinvent" the government, so that it would "work better and cost less". Collectively, as the initiatives and enactments are implemented they are reshaping our federal labor relationship. Some advocates for NPR argue that further significant changes are necessary to achieve the "entrepreneurial, customer-oriented" organization needed to take the federal bureaucracy into the next century; but there are reasons to be concerned about this headlong rush, especially as it seeks to reinvent our federal labor relations. For several reasons, the changes being urged by the National Partnership Council (NPC) and Office of Personnel Management (OPM) could lead to a less efficient and less responsive federal government. This paper contends that changes to our federal labor relationship should be built on a solid consensus after careful consideration of the direction being taken, and not as a result of reinvention proposals derived from piecemeal reform, taken for political expediency, or based on isolated antedotes of short-term success. Even though NPR has had a positive influence in improved labor relations, this does not justify implementing or enacting the recommendations of the NPC or the legislation proposed by the OPM.

The "reinvention" effort has publicized potentially billions of dollars in savings[1] in federal programs and better service to the American people,[2] and there is no question that there has been real streamlining and productive gains following NPR recommendations. Still, any tinkering of a government program can result in savings of million of dollars, whether it is through labor-management partnership, an Inspector General's investigation,[3] or through a manager's personal involvement and direction. Each method has different political and collateral consequences. While, the dollar savings from reinvention may sound impressive,[4] there are significant issues associated with the reform in labor relations. To consider the consequences of NPR, this paper will focus on three areas where the impact of NPR can be seen - expanded bargaining rights for public employee unions; compensation; and privatization.

Every reform effort has an underlying agenda, but it would be misleading to picture the current process as a coordinated reform initiative. It probably makes more sense to understand the process if it is seen as a free-for-all for ideas and a give-and-take by various interest groups, with uneven implementation of competing, sometimes contradictory, management reforms. Despite the lack of coordination, the goal of NPR reform is a strengthening of political authority over the bureaucracy and a greater involvement of the public employee unions in decision-making, at least in the short run. There are also several long term consequences which will be difficult to reverse, even if "reinventing government" falls short during its twelve year course. Some of these residue changes are positive and productive for the future of labor relations, while others have a negative aspect to them. On the negative side, because previously unconventional

---

[1] The NPR said its recommendations would save $108 billion over fiscal years 1994 to 1999. Personnel reductions were to account for $40.4 billion, program and organizational changes for $36.4 billion, and procurement reform would save $22.5 billion. NPR, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS, *Preface* (Sept. 1993). In their 1994 Status Report, NPR said, $46.9 billion in proposed savings was already enacted. NPR, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: STATUS REPORT, p. 7 (Sept. 1994). NPR documents can be downloaded from http://www.npr.gov/npr or http://sunsite.unc.edu/npr/nptoc.html.

[2] Voter focus on the the budget deficit and NPR's promise of billion dollar savings allowed budget-cutting and downsizing to take preeminence as the guiding objectives in the reinvention of government. KETTL, *Building Lasting Reform: Enduring Questions, Missing Answers*, INSIDE THE REINVENTION MACHINE, p. 15 (Eds. DiIulio, Kettl)(1995); JAMES D. CARROLL, *The Rhetoric of Reform and Political Reality in the National Performance Review*, PUB. ADMIN. REV., p. 302, 304 (May/Jun 1995).

[3] The NPR criticized IG investigations into fraud, waste, and abuse for inhibiting creative innovation in the government.

[4] Comparing the $1.5 trillion federal budget to a individual making $50,000 means a savings worth a dime to the individual translate to about 3 million dollars to the government. A savings or cost of 2 million dollars can be news to the taxpayer, but in comparison to the overall budget, we are talking nickels and dimes.

possibilities for reform have been thrown open for consideration and there has been a slackening of centralized control, when a contrary party succeeds the current administration, there could be bureaucratic "gridlock" and greater inefficiency in public service as the new party attempts to change the direction or methods of reform and governance. On the positive side, "partnership" has been accepted by many career managers and union leaders; also, many managers have seen the positive change new innovative management styles can bring to some public agencies; and obsolete regulations and controls have been reexamined. Despite the NPR's promotional literature, there are some problems with NPR reform which will be reviewed in support of the thesis of this paper.

The success of "reinvention" reform is uncertain and Vice-President Gore estimated it would take ten to twelve years.[5] Meanwhile, our civil service and labor relations will undoubtedly be shaped by other events as the years and administrations pass. It is even possible the reinvention effort may be overcome by events, such as budget cuts, a racial change in the administration, or an new wave of reform spirit with a different name. Because local administrations and personnel change, concepts we espouse today, such as partnership, will have an uneven application in the federal government, and at times even the parties who embrace the concept may agree not to use partnership principles in negotiating certain issues. There is no question that in the next decade there will be significant changes in our civil service and labor-management relations, and the predominant question for us should be, Why are we making these changes? Regardless of consequences to NPR, the seeds planted by the current reform will grow and they can never be pruned back to their roots. We should insure that the reform efforts truly lead to a more efficient and democratically responsive government. This can be done by empowering the individual employees, allowing management the flexibility to effectively lead the government agencies, and recognizing that the elected representatives must steer its course. But this does not require us to codify the recommendations of the NPC or the Administration's most recent proposal for labor relations reform.

---

[5] VICE-PRESIDENT GORE, *supra*, note 1.

OVERVIEW OF THE NATIONAL PERFORMANCE REVIEW AND THE FEDERAL LABOR MANAGEMENT RELATIONSHIP

The National Performance Review

In an influential "call to arms", *Reinventing Government*,[6] David Osborne and Ted Gaebler preached "decentralizing" the decision-making process in organizations as a means to increased productivity in government operations; and the way to decentralize decision-making is to encourage employee participation in the management of the organization. Their book provided a number of antedotes to show the success of empowering the employees, leading to two observations: (1) the public employees unions are anxious to help make changes, and (2) the most serious obstacle to participatory management is middle management. One of their conclusions is that middle management is superfluous once employees are making decisions and solving problems.[7] Their call for decentralization was adopted wholeheartedly by the National Performance Review (NPR). The one concession Osborne and Gaebler make to the unique institution of government is that employees cannot simply be turned free if they are to remain accountable to the citizens.[8] This is solved by imposing accountability for results and creating institutions where the employees share the values and the missions of the organizations.

Decentralized organizations are advocated for four reasons. They are more flexible and respond quicker to changes and customers' needs; they are more efficient because front-line workers craft the solutions; they are more innovative; and they generate higher morale, more commitment, and greater productivity.[9] Osborne and Gaebler argue, centralized control only

---

[6] DAVID OSBORNE AND TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992). Ten principles are posited as essential to a successful entrepreneurial public organization - (1) steer rather than row; (2) empower communities; (3) encourage competition; (4) focus on mission, not on rules; (5) fund outcomes, not inputs; (6) serve the customer; (7) concentrate on earnings, not spending; (8) invest in prevention, not cures; (9) decentralize authority; (10) solve problems through the marketplace.

[7] *Id.* at 265. Osborne and Gaebler say the best way to secure union cooperation is to insure job security with comparable pay. "No one wants to innovate themselves out of a job. But when they know they have job security, their attitude toward innovation changes dramatically." *Id.* They also argue that today's managers can manage wider scopes of control because of today's computerized systems. "Hence participatory organizations find that they must eliminate layers and flatten their hierarchies." *Id.*

[8] *Id.* at p. 254.

[9] *Id.* at p. 253. One recent study raises doubts concerning the effectiveness of decentralized federal organizations versus the centralized organizations under Title 5. MESCH, PERRY, WISE, *Bureaucratic and Strategic Human Resource Management: An Empirical Comparison in the Federal Government*, 5 JOUR.PUB. ADM. RESEARCH AND THEORY, p. 385 (Oct. 1995).

causes waste which results in more micromanagement and centralized control, saying "[t]he waste is not being created by inadequate controls. It is being created by removing the sense and fact of control from the only people close enough to the problem to do something about it."[10]

On September 23, 1993, Vice-President Gore released a report for "reinventing" the federal government. With the help of Osborne and about 200 federal employees, the NPR team reviewed the federal bureaucracy and entrepreneurial characteristics, and distilled four essential principles that can be transferred to a public agency: (1) cut red tape; (2) put the customers first; (3) empower employees to get results;[11] and, (4) cut back to basics. Vice-President Gore said, "We will invent a government that puts people first, by: Cutting unnecessary spending Serving its customers Empowering its employees --Helping communities solve their own problems Fostering excellence. ... Here's how. We will: Create a clear sense of mission Steer more, row less Delegate authority and responsibility Replace regulations with incentives Develop budgets based on outcomes. Expose federal operations to competition --Search for market, not administrative, solutions Measure our success by customer satisfaction "[12]

Federal Labor Management Relations

To put the recommended changes in context, it is necessary to digress for a short history of federal labor relations. Federal sector employees began organizing among themselves in the 1800s[13] and in 1912 Congress recognized their right to join labor organizations.[14] They were specifically excluded from the coverage of the NLRA in 1935, and there was no government-wide policy concerning their bargaining power until 1962,[15] when President Kennedy issued

---

[10] REINVENTING GOVERNMENT at p. 254. Quoting Grifford Pinchot III. (Emphasis removed).

[11] Chapter 3 of the Report dealt solely with employee enpowerment outlining six steps to get results - Step 1: Decentralize Decisionmaking Power; Step 2: Hold All Federal Employees Accountable For Results; Step 3: Give Federal Workers The Tools They Need To Do Their Jobs; Step 4: Enhance The Quality Of Worklife; Step 5: Form A Labor-Management Partnership; Step 6: Exert Leadership

[12] NPR, *supra*, note 1.

[13] Two helpful articles on the early formation of federal labor relations are LtC Richard T. Dawson and LtC W. Kirk Underwood, *Overview of Labor Management Relations in the Air Force*, 35 A.F.L.Rev. 1 (1991) and Michael R. McMillian, *Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?*, 127 Mil.L.Rev 169 (1990). *Also see*, COUTURIER, *infra*, note 15.

[14] In 1912, the Lloyd-LaFollette Act gave federal employees the right to join labor organizations.

[15] *See, e.g.*, JEAN J. COUTURIER, PUBLIC SECTOR BARGAINING: CIVIL SERVICE, POLITICS, AND THE RULE OF LAW: THE EVOLVING PROCESS-COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT (1985). The National Federation of Federal Employees (NFFE) was organized in 1913. The American Federation of Government

Executive Order 10988,[16] acknowledging the right of unions to represent the employees and negotiate agreements.[17] One reason given for the new policy was a determination that employee participation in the formulation and implementation of policies and procedures affecting their conditions of employment would lead to improved employee-management relations within the Federal service.[18] Still, Sections 6 and 7 of the Executive Order limited the ability of the union to bargain by reserving broad management rights. In 1969, President Nixon rewrote federal management-labor relations through Executive Order 11419.[19] There were major changes under Exec. Order 11419, such as binding arbitration of disputes and the creation of a third party to oversee the relationship, but management retained its right to exclude certain areas from bargaining.

From 1969 until 1979, labor-management relations in the federal government developed through amendments to Executive Order 11419.[20] Federal labor relations adopted the "exclusive representation" and adversarial "collective bargaining" relationship developed in the private sector, but with more limitations on the scope of bargaining. Labor was dissatisfied with this system. As part of the Civil Service Reform Act of 1978 (CSRA), Congress enacted the Federal Service Labor-Management Relations Statute (the Statute), also known as Title VII of the CSRA.[21] The Statute codified the labor-management relationship along the lines of the NLRA, supplemented with rights, benefits, and limitations previously determined in the executive orders.

The rights reserved to management in the executive orders were listed in the Statute at 5 U.S.C. §7106. During the late 1970s, as hearings and debate were held on labor relations

---

Employees (AFGE) was formed by 32 members of the NFFE which it broke from the AFL in 1932. *See, We Stand United: A History of the AFGE* 6 (No Date).

[16] Executive Order 10988, 27 F. R. 551 (1962).

[17] *Id.*, Section 6.

[18] *Id.*, in Preface.

[19] Executive Order 11491, 34 F. R. 17605 (1969)

[20] List of Executive Orders - E.O. 12107, 44 FR 1055, December 28, 1978 (Relating to the Civil Service Commission and Labor-Management in the Federal Service); E.O.12027, 42 FR 61851, December 5, 1977 (Relating to the Transfer of Certain Executive Development and Other Personnel Functions); E.O.11901, 41 FR 4807, January 30, 1976 (Relating to Labor-Management Relations in the Federal Service); E.O.11838, 40 FR 5743, February 6, 1975 (Relating to Labor-Management Relations in the Federal Service); E.O.11787, 39 FR 20675, June 11, 1974 (Revoking E.O. 10987, Relating to Agency Systems for Appeals From Adverse Actions; E.O.11616, 36 FR 17319, August 26, 1971 (Amending E.O. 11491).

[21] Codified at Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. 7100 *et seq.*

reform, there was an effort to broaden the scope of bargaining and include a union security arrangement; but in the end, while the scope of bargaining may have been widened some, the Statute retained a scope of bargaining which is narrow compared to private sector standards and "fair share" was not included in the Statute.[22] The result was a management rights clause which listed categories of bargaining subjects. Those listed in section 7106(a) were not subject to bargaining, while those listed in section 7106(b)(1) were permissive subjects, which could be bargained at the election of the agency.

An Overview of the NPR and the Federal Labor Management Relationship - Recent Changes and Proposed Reform

The NPR Report released in September 1993 contained hundreds of recommendations to make the federal government "work better and cost less."[23] There were 14 recommendations directed exclusively at Human Resource Management,[24] and in a 97-page accompanying report,[25] the NPR expanded on these 14 recommendations with specific actions to be taken to achieve the recommended reforms. There were also several recommendations directed at leadership, management controls, and the OPM.

In making its recommendation to empower the employees, the NPR said,

---

[22] The legislative history is informative on the conflict between the House bill, which would broaden the scope of bargaining, and the Senate bill, which was closer to the Administration's desires and the executive orders. *See also*, DONALD F. PARKER, SUSAN J. SCHURMAN, AND B. RUTH MONTGOMERY, *Labor-Management Relations Under CSRA: Provisions and Effects* in LEGISLATING BUREAUCRATIC CHANGE: THE CIVIL SERVICE REFORM ACT OF 1978, 161 (1984).

[23] NPR, *supra*, note 1 (1993).

[24] The fourteen recommendations are HRM01- Create a Flexible and Responsive Hiring System; HRM02 - Reform the General Schedule Classification and Basic Pay System; HRM03 - Authorize Agencies to Develop Programs for Improvement of Individual and Organizational Performance; HRM04 - Authorize Agencies to Develop Incentive Awards and Bonus Systems to Improve Individual and Organizational Performance; HRM05 - Strengthen Systems to Support Management in Dealing with Poor Performers; HRM06 - Clearly Define the Objective of Training as the Improvement of Individual and Organizational Performance; Make Training More Market-Driven; HRM07 - Enhance Programs to Provide Family-Friendly Workplaces; HRM08 - Improve Processes and Procedures Established to Provide Workplace Due Process for Employees; HRM09 - Improve Accountability for Equal Employment Opportunity Goals and Accomplishments; HRM10 - Improve Interagency Collaboration and Cross-Training of Human Resource Professionals; HRM11 - Strengthen the Senior Executive Service So That It Becomes a Key Element in the Governmentwide Culture Change Effort; HRM12 - Eliminate Excessive Red Tape and Automate Functions and Information; HRM13 - Form Labor-Management Partnerships for Success; HRM14 - Provide Incentives to Encourage Voluntary Separations.

[25] NPR, REINVENTING HUMAN RESOURCE MANAGEMENT, ACCOMPANYING REPORT OF NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS, (Sept. 1993).

> No move to reorganize for quality can succeed without the full and equal participation of workers and their unions. Indeed, a unionized workplace can provide a leg up because forums already exist for labor and management exchange. The primary barrier that unions and employers must surmount is the adversarial relationship that binds them to noncooperation. Based on mistrust, traditional union-employer relations are not well-suited to handle a culture change that asks workers and managers to think first about the customer and to work hand-in-hand to improve quality.[26]

Based on a premise that federal labor-management relations under the Statute is not working, the NPR recommended the creation of the National Partnership Council (NPC) to champion the cause of "partnership" and reform in federal labor relations. The NPR offered the NPC the following guidance, "Power won't decentralize of its own accord. It must be pushed and pulled out of the hands of the people who have wielded it for so long. It will be a struggle."[27]

The NPC was created on October 1, 1993, by Executive Order 12871.[28] The NPC released its first report[29] in January 1994, in which it presented a range of proposals to reform federal labor-management relations.[30]

Some of the proposals were:[31]

1. Permit consensual agreements between the parties involving any management rights;
2. Broaden the scope of bargaining;
3. Allow bargaining on operational matters protected by §7106(a)(2);
4. Eliminate agency review of the collective bargaining agreements;
5. Submit negotiability issues to arbitration;
6. Use consensus or ADR to establish agency rules that limit negotiation; and,
7. Rely more on alternate dispute resolution for a variety of disputes.[32] The standard of review recommended for resolving disputes is one of "good government".[33]

---

[26] NPR, *supra*, note 1, Chapter 3 (1993).
[27] *Id.*
[28] Executive Order 12871, 58 FR 52201 (Oct 1, 1993). Its original 2 year term was extended to 1997 by E.O. 12974, 60 FR 51875 (Sep 29, 1995). Its membership was amended by E.O. 12983, 60 FR 66855 (Dec 21, 1995).
[29] NPC, A REPORT TO THE PRESIDENT ON IMPLEMENTING RECOMMENDATIONS OF THE NATIONAL PERFORMANCE REVIEW (Jan. 1994).
[30] Carol Ban provides some insight on the debate occuring in the NPC during this time. CAROL BAN, *Unions, Management, and the NPR*, in INSIDE THE REINVENTION MACHINE, 131, 138-141 (Eds. DiIulio, Kettl)(1995).
[31] NPC, *supra*, note 29 at pp. ii, iii., 12-23.
[32] Some other interesting proposals were institution of a "fair share dues" security agreement; implement routine use access to the union for otherwise exempt information; allow voluntary recognition by an agency of an exclusive bargaining representative; and amend the definition of supervisor. *Id.* at pp. iv-v, 12-23.
[33] *Id.* at p.11.

If these proposals seem pro-union, it should be understood that the NPC was initially composed of 4 labor leaders, 4 labor relations or personnel political appointees, and 3 executive agency political appointees. In January 1996, a Senior Executive Service representative and a Federal Managers Association representative were added to the NPC.[34] Besides creating the NPC, Executive Order 12871, also expanded the scope of bargaining between the federal agencies and the unions by directing agency heads to negotiate the permissive subjects listed in §7106(b)(1).[35] This direction to the agency heads will be discussed below.

The Office of Personnel Management (OPM) became a natural place to begin implementing the recommendations of the NPR and NPC, and the OPM began a process of decentralizing and destroying regulations, such as "sunsetting" the 10,000 page Federal Personnel Manual. The move to deregulate the bureaucracy has consequences in the labor-management relationship because the Statute prevented negotiation of proposals which concerned a government-wide regulation;[36] by deleting a government-wide regulations, OPM removed a barrier to bargaining.[37]

The OPM also delivered on the administration's promise to deliver legislative reform to reinvent the civil service and labor relations. In May 1995, the OPM floated draft legislation

---

[34] The NPC was originally composed of 11 representatives, one each from the three largest unions (AFGE, NTEU, NFFE), one from the AFL-CIO Public Employee Dept., and seven representatives from federal agencies, (1) Director of the Office of Personnel Management ("OPM"); (2) Deputy Secretary of Labor; (3) Deputy Director for Management, Office of Management and Budget; (4) Chair, Federal Labor Relations Authority; (5) Federal Mediation and Conciliation Director; (6 & 7) A deputy Secretary or other officer with department- or agency-wide authority from two executive departments or agencies (hereafter collectively "agency"), not otherwise represented on the Council. The membership was enlarged to include management representatives by E.O. 12983, 60 FR 66855 (Dec 21, 1995), which amended E.O. 12871 by adding, "one elected office holder each from both the Senior Executives Association and the Federal Managers Association."

[35] E.O. 12871 at Section 2. "Section 2. Implementation of Labor-Management Partnerships Throughout the Executive Branch. The head of each agency subject to the provisions of chapter 71 of Title 5, United States Code shall: ... . (d) negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same: ... ." *Id.*

[36] 5 U.S.C. §7117(a)(1) (1995). There is no such deference to agency-wide regulations. The agencies must show a compelling need for the regulation to exclude bargaining.

[37] The sunset of the FPM provisions has arisen in a number of ways. Note that in *GSA and NFFE* below the OPM guidance was resurrected. *FAA, Little Rock and NATCA*, 51 FLRA No. 86 (Mar. 29, 1996) (Although the FPM was abolished in Dec. 31, 1993, letter guidance affecting this case was provisionally retained through Dec. 31, 1994.); *FAA, Little Rock, and NATCA*, 51 FLRA 216, 51 FLRA No. 24 (1995); *GSA and NFFE*, 50 FLRA 136, 50 FLRA No. 28 (1995)(Authority accepts OPM's position that the rescinded OPM guidance on hybrid workschedules is still persausive for interpreting and administering the Work Schedules Act); *NFFE and Dept of the Army, Rock Island Arsenal Rock Island*, 49 FLRA 151, 49 FLRA No. 21, (1994)(Authority did not apply provisions of FPM chapter which had been abolished, but applied FPM provisions that have been provisionally retained.)

entitled the Federal Human Resource Management Reinvention Act of 1995 (1995 HRM Reinvention Act). Hearings were held in September and October 1995 before the Committee on Government Reform and Oversight and proposed legislation, which was touted as "the most significant change in civil service law in a century"[38] was criticized by both management and the unions. On review, the proposed legislation was actually a rehash of the NPR and NPC recommendations, lifting the language verbatim from their reports. It was superficial and not a vehicle for producing long-term labor relations reform.

Most of the 1995 HRM Reinvention Act addressed the personnel system, by decentralizing many personnel functions. The legislation would codify proposals to decentralize the bureaucracy and insure union participation in any change. For example, one section of the proposed legislation gives the agencies the authority to design and implement their own incentive award and performance management programs, but it also requires the agencies to include represented and non-represented employees in the program design and operation. The agencies had already received substantial freedom to design their own programs and most of the proposed decentralization is already possible under current laws, but legislation is required to insure collective bargaining in the design of the programs.[39]

Significant reform in classification of personnel is also included. It would allow "broad banding" classification and give OPM to establish the grade level criteria and salaries. The agencies could implement the broad banding in part or all of their organizations, without prior approval, so long as their plan conforms to the OPM criteria. It will be explained later in the paper that giving discretionary authority to the agencies generally opens these areas up for collective bargaining.

The 1995 HRM Reinvention Act also adopts verbatim the recommendation of the NPC that a "Good Government" standard be established in the bargaining relationship. The Good Government standard requires all parties engaged in substantive bargaining to pursue solutions that promote "increased quality and productivity, customer service, mission accomplishment, efficiency, quality of work life, employee empowerment, organizational performance, and, in the

[38] ALLAN HOLMES, *Reform Trickles In*, GOVERNMENT EXECUTIVE, 46, 47 (Oct. 1995).
[39] 5 CFR Parts 430 and 451, as amended by 60 FR 43936 (August 23, 1995), to be effective Sept. 22, 1995.

case of the Department of Defense, military readiness; while considering the legitimate interest of both parties."[40]

Finally, the 1995 HRM Reinvention Act would codify the provisions of Executive Order 12871 by providing statutory authority for the NPC, requiring the establishment of labor-management partnerships throughout the executive branch and making the permissive subjects of bargaining listed in 5 U.S.C. §7106(b)(1) mandatory subjects of bargaining. The proposed legislation would also insert another layer in the federal bureaucracy by authorizing agency level partnership councils which would develop agency level policies and regulations affecting conditions of employment that are binding on those components and bargaining units subordinate to the council.

The 1995 HRM Reinvention Act is essentially dead. The criticism from labor and management and the unlikely prospect that it would be enacted by this Congress shelved the proposed legislation. With the election year looming, it is unlikely civil service reform will be enacted this year; however, a Washington Post news correspondent reported that the Administration will unveil a more modest civil service reform package soon.[41] Because of union objections, the manager's ability to dock a percentage of the employee's pay for poor performance will not be in the new proposal. Even if the new proposal is unveiled, it is unlikely to be acted on this year, and its only purpose would be political machinations.

IS THERE A NEED FOR THE REFORM PROPOSED UNDER "REINVENTION"?

Recurring reform has been described as a necessary lubricant for our constitutional system,[42] alternatively emphasizing either popular representation, neutral expertise, or executive leadership at various times in American history. It is difficult to place the current reform effort in such a clear pigeon-hole because of its broad character and scattered implementation. Generally, past reforms have focused on the advantage gained by the executive versus the legislative branch

---

[40] The language is verbatim from the recommendations of the NPC. NPC, *supra*, note 29 at p. 11.
[41] MIKE CAUSEY, *Super-Safe vs. High Return*, THE WASH. POST, p. B-2, col. 1, April 5, 1996.
[42] J.L. GARNETT, *Operationalizing the Constitution Via Administrative Reorganizations: Oilcans, Trends, and Proverbs*, THE AMERICAN CONSTITUTION AND THE ADMINISTRATIVE STATE: CONSTITUTIONALISM IN THE LATE 20TH CENTURY 83, 86 (1989).

in their control over the federal bureaucracy, and under the reinvention reform, political control by the executive branch over the bureaucracy has been bolstered. But it is also proposed that an advantage go to a part of the bureaucracy, the public unions, which is not a branch of the federal government. If enacted, the proposals would imbed union ideology in the decision-making process of the federal government; and even if there is a change in administrations, it is unlikely this entanglement can be disjoined once it is enacted. The question is how deep and how far should this implantation proceed?

At the time the NPR reinvention reform was initiated, federal labor relations was already naturally evolving to employee empowerment and partnership as the federal agencies experimented with TQM, quality, and other innovative managerial practices since the 1970s.[43] This was occurring without the assistance of legislation or a demand for amending the federal labor relations statute. In a recent report on the "reinvention laboratories", which were instituted by the NPR, the General Accounting Office (GAO) asked the laboratories when their efforts actually began, regardless of when they were officially designated as "reinvention labs". "The lab start dates varied widely, ranging from as early as 1984 to as recently as March 1995 ... ."[44] Forty percent of the responding labs said their reinvention efforts originated in the agencies' quality programs and were an outgrowth from efforts begun in the late 1980s and early 1990s.

One manager put the reinvention process in perspective when he described the "pony express" strategy of reform. The manager saw NPR reform as just another "flavor of the month" following a long list of previous management reforms, but he saw each reform effort as another opportunity to continue a preconceived agenda, using each one as a Pony Express rider would use a fresh horse. "'I started out calling what I wanted to do TQM, ... [t]hen it was reinvention. Today it is reengineering. But it's still the same changes I wanted to make all along.'"[45]

---

[43] Under Exec. Order 11491, the Asst. Secy. of Labor reviewed an employee participation committee created in June 1977. *Veterans Admin. Hosp., Muskogee, Oklahoma*, A/SLMR No. 301, 3A/SLMR 491 (1978). The Asst. Sec. found management violated the Executive Order by establishing the committee and dealing directly with employees over conditions of employment. The ALJ in Dept of the *Navy, Pearl Harbor Navy Shipyard*, 29 FLRA No. 96, 29 FLRA 1236 (1987) briefly describes the import of quality programs during the 1970s. 29 FLRA at p. 1241.

[44] GAO, MANAGEMENT REFORM - STATUS OF AGENCY REINVENTION LAB EFFORTS p. 26 (March 1996)(GAO/GGD-96-69). Thirteen percent of the respondents said they were told to initiate the effort by their agency officials.

[45] RONALD SANDERS AND JAMES THOMPSON, *The Reinvention Revolution*, GOV. EXEC., Reinvention Insert, p. 6A (March 1996).

On February 14, 1996, Vice-President Gore presented four National Partnership Council awards; the first time the awards had ever been presented. One of the recipients was the Dept of Army Red River Depot where partnership between union and management saved the depot from certain extinction.[46] The Red River Depot was highlighted in September 1994 in a NPR status/ progress report.[47] The NPR perused several success stories on employee empowerment, and said:

> In *From Red Tape to Results*, NPR defined the 'basic ingredients of a healthy, productive work environment' as 'managers who innovate and motivate, and workers who are free to improvise and make decisions.' And, as illustrated by Red River, a key step to finding those managers and workers is transforming the labor-management relationship from adversarial to cooperative."[48]

But the NPR was not the catalyst to developing partnership at the Depot. In 1992, the Red River Army Depot had a tradition of labor-management strife; when the new commander preceded his assignment there by first traveling through plants like the Saturn Corporation and other plants where labor-management cooperation was being tested. At the same time, like other unions, the union at Red River depot recognized that down-sizing was going to proceed, with or without their cooperation. With a shift in attitude by both parties, management and labor committed to labor-management cooperation. The Depot began working partnership principles and developed a model known as HEARTS (Honesty, Ethics, Accountability, Respect, Trust, and Support). In 1993, they reorganized into self-managed work teams, agreed to share decision-making, and adopted gain-sharing[49] through incentive awards. Since the change, productivity at the Depot has increased, costs are down, and there are fewer ULPs, grievances, and appeals to the MSPB. But again that process had begun before the NPR initiatives.

It is generally acknowledged by most observers and parties that employee participation in the federal workplace is desirable and brings an increase in productivity. It is also generally accepted, and it has been shown in studies,[50] that employee participation is more productive

---

[46] BNA, 34 GERR 243 (Feb. 19, 1996).
[47] NPR, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: STATUS REPORT (Sept. 1994).
[48] *Id.* at p. 38.
[49] A dispute regarding a gain-sharing proposal was reviewed in *Dept. of Army, Red River Depot v. FLRA*, 977 F.2d 1490 (D.C. Cir. 1992), *on remand, NAGE Local R14-52 and Dept of Army, Red River Depot*, 48 FLRA 1198 (1993).
[50] *See e.g.*, LINDA THORNBURG, *Can Employee Participation Really Work?*, HRMAGAZINE, 48 (Nov 1993); ROBERT W. MILLER AND FREDRICK N. PRICHARD, *Factors Associated with Workers' Inclination to Participate in an*

when an independent representative for the employees, such as a union, is present in the workplace. As the natural evolution already occurring in the workplace indicates, employee empowerment does not require statutory reform of the labor management relationship. The long standing labor policy that employee participation be coordinated through the "exclusive representative" for those employees represented by unions naturally requires that the unions be recognized as prime players in any managerial reorganization.

There is a natural contradiction inherent in partnership councils between management and union. The partnership works only when management and labor are headed the same direction and there is trust between the parties. It will not work if either party has an uncompromising or a confrontational attitude in negotiations. At the Red River Depot, both management and labor recognized that without partnership the depot literally faced extinction. In another recent partnership success story, Kelly AFB, Texas, it was reported that $2 million in litigation costs was saved between 1992 and 1994, with a reduction in grievances from 47 to 12 and a reduction in ULPs from 192 to 1.[51] But it should be pointed out that Kelly AFB was on the short list of maintenance depots being considered for closure. In both Red River and Kelly AFB, management and labor had common uniting goals; it was their common interest that brought them together, not reform legislation.

Another experiment which shows that it is the communication process that improves labor relations and not regulatory or statutory changes, is found in a pilot program introduced by the Federal Labor Relations Authority (the Authority) to reduce grievances and ULPs. Under the program, frequent filers of ULPs were targeted for special dispute resolution. Under one part of the program, a judge unconnected with the case would conduct settlement negotiations with the parties prior to hearing. Since the project started, 76% of the cases in the program were settled[52]

Employee Involvement Program, GROUP AND ORGANIZATION MANAGEMENT, 414 (Dec 1992); WILLIAM COOKE, *Product Quality Improvement Through Employee Participation: The Effects of Unionization and Joint Union-Management Administration,* INDUSTRIAL AND LABOR RELATIONS REVIEW, 119 (Oct 1992); BENNETT HARRISON, *The Failure of Worker Participation,* TECHNOLOGY REVIEW, 74 (Jan. 1991).

[51] DAVID HORNESTAY, *Partnership Pays,* GOVERNMENT EXEC. p. 43 (Feb. 1996). It would be interesting to se a real cost study, but the variables, such as productivity increases versus costs of negotiated union proposals, may make this too complicated. In any event the cost of "labor peace" and "better working conditions" in the federal workplace may be worth the cost without any other return.

[52] *Id.*

and a survey of the frequent filers showed that ULP filings dropped nearly 35 percent at those agencies that were targeted.[53]

A GAO study of the reinvention laboratories provides another reason to question the need for broad-ranging personnel and labor relations reform.[54] One of the advantages accruing to a reinvention lab is its ability to seek waivers of workplace regulations. The idea is to identify those regulations issued by central management offices, such as OPM, OMB, or GSA, and use that information to decentralize regulatory management. Although encouraged to seek such waivers, 60 percent of the survey respondents indicated they had not sought such waivers because the constraints on their lab operations were nonregulatory or so far did not require any regulatory waiver. Some requests were overcome by recent legislation, such as the Federal Acquisition Streamlining Act, or deregulation already in progress; but even then, of the nearly 1,000 waiver requests actually made, over one-half concerned constraints issued by the lab's own agency and only 32 percent concerned government-wide regulations. In another break down of the waiver requests, it was found that less than one-third of them involved personnel rules, with work processes and procurement rules comprising at least as much or more of the waiver requests. These statistics raise the question, are the government-wide personnel regulations drawing blame by NPR for government's inefficiency, really the obstacle they are painted to be, if less than 12% (30% x 40%) of the reinvention labs found it necessary to seek waivers of these regulations?

Trust is the essential ingredient to partnership and cooperation.[55] Carol Ban put it simply when she listed "credibility" as one problem facing union and management in establishing a nonadversarial relationship. She said,

> "Credibility is an issue in two ways. First, both credibilty and trust are necessary for creation of genuine labor-management partnerships. Unions need to know that management's promises of cooperation are not just lip service, and that they will not find themselves cut out of the tough decisions, while management needs assurance that unions will use their new power responsibily."[56]

---

[53] BNA, *Targeting Frequent Filers Reduced Unfair Practice Charges, FLRA Says*, 34 GERR 242 (Feb 19, 1996).
[54] GAO, *supra*, note 42 at pp. 35-41.
[55] CAROL BAN, *Unions, Management, and the NPR* in INSIDE THE REINVENTION MACHINE, 131, 150-151 (Eds. DiIulio, Kettl)(1995).
[56] The second part of the problem is establishing credibility with career civil servants and managers, those most threatened by cut-backs and downsizing.

It is easy to understand the position of the Clinton Administration. To maintain the trust and cooperation of the unions, as the government continued to reform and downsize, the unions had to be given expanded bargaining rights and their legitimacy as the exclusive representative of the federal employees had to be recognized. With a more contentious administration or demanding Congress, the downsizing and budget cuts would have resulted in disruptive litigation and waste of resources for both labor and management, with perhaps counteracting legislative reform. This possible debacle has been avoided because of the development of partnership in the federal government, the administration's incentives for the unions, and Congress' distraction to other issues.

The encouragement of partnership has been beneficial to federal labor relations; but, while fundamental in concept, the change is really only a superficial in the overall relationship. If the proposals envisoned by the NPC and 1995 HRM Reinvention Act are enacted labor will be established as a primary player in the federal decision-making process at the expense of management and the elected representatives. A party which generally favors a labor-oriented, expansive government will be entrenched in the decision-making processes of the federal bureaucracy. This arrangement can be effective as we struggle through our current downsizing; but in the long run, it will not lead to an efficient and effective government, without some way to insure continued cooperation and trust between the parties. There is no way to insure that environment in the future.

This is not to say that NPR reform is irrelevant to bringing long-lasting reform to federal labor relations. NPR has encouraged federal agencies to more quickly adopt productive programs which were already naturally evolving. NPR cleared some of the obstacles and legitimized the innovative methods of management, which were previously avoided. But it is important we distinguish the evolution of federal labor relations and the NPR reform for two reasons. One, NPR reform has some serious handicaps and the evolution of federal labor management relations should not be tied to the success or failure of NPR; and two, NPR is advocating changes in management-labor relations which raise legitimate opposition from concerned stake-holders, and which should not be imposed without a detailed debate on the future of our labor-management relationship. While the NPR is trying to change the workculture in the federal government, the future of federal labor relations should not be steered by antedotes

of selected success stories or visions of "labor peace" which may go up in smoke in the next election. The facts show that employee participation, reinvention, and partnership does not work everywhere. There has been a great deal of criticism of NPR for its failure to obtain a consensus from the Congress,[57] develop a sustainable vision,[58] reconcile its contrary themes,[59] or recognize the need to include democratic accountability in the reform picture.[60] The bottomline is the Federal government can reform itself and adopt innovative management styles which empower the employees without amending the foundations of the current labor relationship as proposed by NPC and the 1995 HRM Reinvention Act.

THE POLITICS OF REFORM

"Reorganization is nothing more than the continuation of politics by other means."[61] The ability to politicize the federal bureaucracy through reform and reorganization has been reviewed by several writers. [62] Peri Arnold, a professor of government studies, has categorized the current reform as the same political promise made by every outsider president since 1970, a promise to transfrom the government into something it is not, a down-sized, customer-friendly, service provider.[63] He points out that every reform indicts government as having failed to serve the

---

[57] GAO, MANAGEMENT REFORM, IMPLEMENTATION OF THE NATIONAL PERFORMANCE REVIEW'S RECOMMENDATIONS, pp. 6-7 (Dec 1994); CHRISTOPHER FOREMAN, JR., *Reinventing Politics? The NPR Meets Congress* in INSIDE THE REINVENTION MACHINE, p. 152 (Eds. DiIulio, Kettl)(1995); CHRISTOPHER FOREMAN, JR., *Reinventing Capital Hill*?, THE BROOKINGS REVIEW, p. 35 (Winter 1995).

[58] *See e.g.*, JAMES THOMPSON AND VERNON JONES, *Reinventing the Federal Government: The Role of Theory in Reform Implementation*, 25 AMER. REV. PUB. ADMIN. 183 (June 1995); KETTL, *Building Lasting Reform: Enduring Questions, Missing Answers*, INSIDE THE REINVENTION MACHINE, p. 31 (Eds. DiIulio, Kettl)(1995); PERI E. ARNOLD, *Reform's Changing Role*, PUB. ADMIN. REV., 407 (Sep/Oct 1995).

[59] *See e.g.*, KETTL, *supra*, note 58 at p. 14; JAMES D. CARROLL, *The Rhetoric of Reform and Political Reality in the National Performance Review*, PUB. ADMIN. REV. 302 (May/Jun 1995).

[60] *See e.g.*, RONALD C. MOE, *The 'Reinventing Government' Exercise: Misinterpreting the Problem, Misjudging the Consequences*, PUB. ADMIN. REV. 111 (Mar/Apr 1994).

[61] J.L. GARNETT, *Operationalizing the Conmstitution Via Adminsitrative Reorganization: Oilcans, Trends, and Proverbs* in THE AMERICAN CONSTITUTION AND THE ADMINISTRATIVE STATE: CONSTITUTIONALISM IN THE LATE 20TH CENTURY 83, 98 (R. Stillman, II, 1987).

[62] PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY (1995); R.N. JOHNSON & G.D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY PP. 160-162 (1994); MARK L. GOLDSTEIN, AMERICA'S HOLLOW GOVERNMENT : HOW WASH. HAS FAILED THE PEOPLE (1992); CHESTER NEWLAND, *Public Executives: Imperium, Sacerdotium, Collegium? Bicentennial Leadership Challenges*, in THE AMERICAN CONSTITUTION AND THE ADMINISTRATIVE STATE: CONSTITUTIONALISM IN THE LATE 20TH CENTURY 83, 98 (R. Stillman, II, 1987).

[63] PERI E. ARNOLD, *supra*, note 58.

people, and every reform claims that repairing administrative processes and organizations will transform the government. He finds specific fault with NPR reform in its failure to recognize or acknowledge its own political consequences. He says the goals of NPR must be understood as being deeply political, touching on government's fundamental aspects; and the apolitical facet presented by the NPR shows a naive or disingenuous understanding of interest group politics. The following is a simple attempt to identify the three principal interest groups in labor management reform, the unions, the Congress, and the executive branch, and what their interests might be in NPR reform.

- The Union

There are approximately 2,000,000 employees[64] in the executive branch of the federal government, excluding the 845,000 employees of the postal service. More than 2,000 local bargaining units represent approximately 1,300,000 federal employees, with the locals of four national unions representing 80% of the employees.[65] It is unknown how many represented employees are actually members of the unions, but two relatively recent articles report union membership for the AFGE and NFFE at about 25 per cent and 50 percent for the NTEU.[66] The unions have consistently pushed a number of themes since their recognition which can be distilled down to (1) expanded bargaining rights with third party arbitration and (2) "fair share" dues. Like any other interest group they had always lobbied for their membership with varying

---

[64] In September 1995, there were 2,010,921 employees in the executive branch (excluding 845,393 Postal Service employees). OFFICE OF PERSONNEL MANAGEMENT, FEDERAL CIVILIAN WORKFORCE STATISTICS: EMPLOYMENT AND TRENDS AS OF SEPTEMBER 1995. By law the Full Time Equivalent (FTE) federal workforce (excluding the Postal Service) is limited to 2,003,300 during FY 1996; 1,963,300 during FY 1997; 1,922,300 during FY 1998; and 1,882,300 during FY 1999. 5 U.S.C. §5. Approximately 830,000 are employed by the Dept of Defense. Independent agencies, such as the EPA, NASA, or GSA, employed approximately 1,073, 521 and the other significant executive agencies employed the following - Veterans Affairs - 263,904; Treasury - 155,951; Agriculture - 113,321; Justice - 103,262; Transportation - 63,552; Health and Human Services - 59,788.

[65] The four unions are the American Federation of Government Employees (AFGE)(600,000), National Treasury Employees Union (NTEU)(150,000), National Federation of Federal Employees (NFFE)(150,000), and the National Association of Government Employees (NAGE). These numbers were found in NPC, NATIONAL PARTNERSHIP COUNCIL 1994 ASSESSMENT OF PARTNERSHIP ACTIVITIES (Feb. 13, 1995) and NPC, *supra*, note 29 (Jan. 1994).

[66] MARICK F. MASTERS AND ROBERT S. ATKIN, *Bargaining, Financial, and Political Bases of Federal Sector Unions*, REV. OF PUB. PERS. ADM. 5, 12-14 (Winter 1995); CAROLYN BAN, *supra*, note 55 at p. 134 (Citing a 1990 article concerned with union funds). This percentage can be somewhat misleading because there is no union security arrangement in the federal sector, and the unions have consistently vocalized their concern about "free-riders".

success;[67] but recognizing they have entered an era when the federal government will inevitably be reduced, the union leaders believe cooperation with a amicable, like-minded administration is essential to protecting their members.[68] While cooperation is the course taken by the union leaders, they have their dissenters who criticize them for "putting the AFGE label on the [employees'] pink slip".[69]

At first glance, the interests of the unions and the politics between the unions and the administration appears obvious. Some observers cynically attribute the administration's motive for generally supporting the unions to a pay-off for support during the election, union silence during the NAFTA debate, or, looking specifically at the public employee unions, as an inducement for not effectively resisting the inevitable federal employee drawdown. This ignores an actual shift in strategy by the labor leaders and the executive branch. Labor could have fought downsizing through ULPs, grievances, and lobbying. The executive branch could have bashed the unions as obstructionists. Instead both sides agreed to negotiate the evitable downsizing, as opposed to the customary posturing found in the adversarial relationship. Regardless of whether it is due to politics or common-sense, the empowerment of the federal employee unions signals a political change which goes beyond the short-term objectives of protecting the employees during the current downsizing. The unions want to be involved in management's decision-making process on "how will the government be run"; and just as importantly, they want to be involved

---

[67] *See*, R. JOHNSON AND G. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY: THE ECONOMICS AND POLITICS OF INSTITUTIONAL CHANGE (1994). See also, BRIAN J. COOK, *Book Review*, AMER. POL. SCIEN. REV. 763 (Sep 1995)("But in trying to explain the political success of the unions, [R. Johnson and G. Libecap] also reveal the limits of rational choice analysis of interest group power. All they essentially conclude is that the unions are powerful by virtue of a little voting power, big political action committee sums strategically spent, and lobbying power. ... None of this is much of a revelation." *Id.*)

[68] Even the unions supporting partnership find there is a limit to their cooperation as shown by two recent law suits, *AFGE v. Clinton*, DC-S Ohio, Eastern Div, No. C2 96-0283, 3/18/96, (discussed *infra* at footnote 188), reported in *Privatization: AFGE Suit Alleges That Privatization of Air Force Base Functions is Illegal*, 34 GERR 420 (March 25, 1996) and *NTEU v. U.S.*, DC DC, No. 96-624, filed Apr. 9, 1996, (discussed in footnote 206), reported in BNA, *NTEU Suit Challenges Constitutionality of Recently Signed Line-Item Veto Bill*, 34 GERR 544 (Apr. 15, 1996).

[69] Some labor supporters accuse AFGE of "putting the AFGE label on the [employees'] pink slip" and "Instead of management's doing the cuts, the union did them". MIKE PARKER AND JANE SLAUGHTER, *Labor-Management Partnerships Are Harmful* in WORK: OPPOSING VIEWPOINTS, 146, 152, (1993). *See also*, CAROL BAN, *supra*, note 55 at p. 144. ("several observers, ..., expressed the concern that union leaders are too far out in front of their members.") MIKE CAUSEY, *A Suit That Doesn't Fit?*, THE WASH. POST, Feb. 5, 1996, p. B-2, col. 1. ("Some union members, apparently a minority, are uneasy with their leaders sitting on "partnership" councils ... ."); MIKE CAUSEY, *They Know Where You Live*, THE WASH. POST, Apr. 24, 1996, p. D-2, col. 1. (OPM releases names and addresses of bargaining unit members to unions. "In return for their cooperation on downsizing and reengineering of government, union leaders have been given active roles in partnership councils with top career and political officials.")

in deciding, "what the government will do". For example, they hope their "partnership" with the White House will give them a voice and a hand in directing which operations are farmed out to privatization.[70]

- The Congress

The legislature is conspicuously absent from the NPR reform, even though the NPR staff acknowledges that 173 of their 384 recommendations require legislative action in order to be implemented.[71] Legislative action is particularly important in reforming the federal personnel system, because it is covered by comphrensive statutes on pay, classification, fringe benefits, and due process. Congress and the Presidency each attempt to control the bureaucracy and impose their policies through the agencies and the civil service. Congress exerts its control through committee oversight, personnel or organizational legislation, or the budgetary process. While Congress has been conspicuously absent from the NPR process, there are several recent acts which were passed to rein in and better manage the government.[72] Two of them, the Chief Financial Officers Act of 1990 (CFOA),[73] as amended[74] by the Government Management Reform Act of 1994 (CMRA), and the Government Performance and Results Act of 1993 (GPRA),[75] have the potential for significantly enhancing the strength of Congress in its control over the agencies. The CFOA imposes fiscal accountability, while the GPRA imposes performance accountability. One distinguished professor of public administration, David Rosenbloom, says, "Politically [the GPRA] is connected to the NPR, but institutionally it is at odds with it. It is likely to last because it will be in Congress' interest to embrace GPRA's opportunities for steering federal administrative activity (micromanagement)."[76] Actually,

---

[70] MIKE CAUSEY, *Private Pleasures*, THE WASH. POST, Mar. 3, 1996, at B-2, col. 1. (quoting union officials).
[71] GAO, *supra*, note 57 at p. 6.
[72] These acts include the CHIEF FINANCIAL OFFICERS ACT OF 1990, FEDERAL ACQUISITION STREAMLINING ACT, The INSPECTOR GENERAL ACT, the FEDERAL EMPLOYEE PAY COMPARABILITY ACT OF 1990, the GOVERNMENT PERFORMANCE AND RESULTS ACT OF 1993, the GOVERNMENT MANAGEMENT REFORM ACT OF 1994, among others.
[73] CHIEF FINANCIAL OFFICERS ACT OF 1990, Pub. L.101-576, 104 Stat 2838, Nov. 15, 1990.
[74] The CFOA was amended by the SOCIAL SECURITY INDEPENDENCE AND PROGRAM IMPROVEMENT ACT OF 1994, Pub. L. 103-296 §108(j)(1), 108 Stat 1464, Aug, 15, 1994. and the GOVERNMENT MANAGEMENT REFORM ACT OF 1994, Pub.L. 103-356, 108 Stat 3410, Oct. 13, 1994.
[75] GOVERNMENT PERFORMANCE AND RESULTS ACT of 1993, Pub.L. 103-62, 107 Stat 285, Aug. 3, 1993.
[76] DAVID H. ROSENBLOOM, *The Context of Management Reform*, THE PUBLIC MANAGER, 3, 5 (Spring 1995).

Congress' interest in the GPRA will depend on the outcome of the 1996 elections. In the NPR's view, and the view of the executive branch, Congress should authorize and fund programs and then step back. But Congress' perchance for micromanagement waxes and wanes depending on the confidence Congress has in the executive branch., If the Presidency and the Congress remain divided and controlled by the current incumbents, the GPRA is a tool for micromanagement and policy steering that is just waiting for Congress to seize it.

While the change in the control of Congress in the 1994 elections may have ended a run of reform legislation, it did not lessen the reform spirit. Conflicting philosophies over the direction of the federal government forced the political parties to divert their energies to budgetary battles and grand changes in the organizational landscape. Distracted by these broader efforts, Congress is currently paying little attention to the CFOA or GPRA, but depending on the outcome of the 1996 elections, these acts could assume a more prominent role in steering the federal bureaucracy. Meanwhile, previously taking Congress for granted, the NPR and the administration are now facing a contrary legislature. This is a Congress which is considering amendment of NLRA §8(a)(2), a national "right to work" law, and is accusing the AFL-CIO of violating federal laws for promising political activity in key congressional districts during this coming election year. Statutory reform of the civil service that had been planned by the Administration had to be rethought. Proposed legislation drafted by OPM had to be altered before being released in May 1995,[77] but even with the changes, the legislation will not make it out of its first committee hearings. There are a few other legislative proposals being floated by

[77] Carol Ban notes union disappointment at the scope of proposed labor relations reform. BAN, *supra*, note 55 at p.149. ("Union leaders were reported to feeling 'estranged' because the administration dropped labor law reform from the draft civil service reform bill."). In hearings on Civil Service Reform before the Subcommittee on Civil Service of the House Committee on Government Reform and Oversight, Donald Devine highlights what he considers to be unacceptable proposals the Clinton Adminsitration withdrew from proposed legislation for political reasons. He then vigorously attacks the remaining provisions of the Act. *See*, Testimony of Donald C. Devine, given Oct. 12, 1995 and memorandum, *Making Government Work: How Congress Can Really Reinvent Government* (Aug. 24, 1995). "Contrary to the Administration's own staff recommendations, which were overruled personally by Vice President Al Gore, the White House decided to give the unions equal power with management in 'labor-management councils' that would make the major management decisions in agencies of the federal government. In addition, it was proposed originally that the unions be given an involuntary dues checkoff from federal employees-without even a requirement for representation elections. While the White House was forced to retreat from the second proposal, the first was codified in Executive Order 12871, issued in 1993, making the unions "full partners" with management in the assignment and classification of work and creating labor-management committees to enforce this throughout the government. A presidential 'partnership council' of union and Administration officials was created to make further recommendations, including the proposal for involuntary dues collection and union representation by card submission rather than by secret ballot." *Id.*

Congress and the administration dealing with personnel reform and the Administration is preparing another reform proposal, but real civil service or labor relations reform is unlikely in 1996.

- The Executive Branch

It is difficult to lay out the interests of this Administration in labor relations reform. Politically, this Administration is committed to reducing the federal workforce, reducing the budget deficit, and maintaining the strength and services of the federal government. Like every administration before it, strengthening the Executive branch versus a contrary Congress will be on its agenda, but there is also something unique here that was not attempted by previous administrations. It is conceivable that the current administration wants to "burrow" the public employee unions into the decision-making process of the government in the same way every administration has burrowed its like-minded employees into the bureaucracy. At the same time instead of strengthening the executive office *per se* it is actually strengthening the control of the political appointees.[78]

Most every reform effort in this century has strengthened the executive branch. Generally the executive branch is able to pursue its policies through career bureaucrats, directed by a cadre of political appointees. An accumulation of these appointees in the upper echelons of the government began with the creation of the Schedule C employee under President Eisenhower.[79] It was followed feverently by President Nixon, and taught in the Malek Personnel Manual[80] of that administration. Political appointments were legitimized in the Civil Service Reform Act of 1978 when President Carter established the Senior Executive Service, 10% of which could be political appointees. The process was masterfully managed by President Reagan, who had a say

---

[78] Consider the following, "The entire [1993 NPR] Report implicitedly argues that greater faith should be placed in the abilities and motivations of the politically appointed leadership in the departments and agencies." MOE, *supra*, note 60 at p. 116.

[79] *See*, CONGRESSIONAL RESEARCH SERVICE LIBRARY OF CONGRESS TO THE JOINT COMM. ON THE ORGANIZATION OF THE CONGRESS, 103D CONG., 1ST SESS., CONGRESSIONAL REORGANIZATION: OPTIONS FOR CHANGE (Joint Committee Print 1993) at pp. 166-170. *(The Balance Between Career Executives and Political Appointees)* (Criticizing the increase in political appointees).

[80] The Malek Manual was a 113 page manual which detailed how to create networks, layering, or parallel paths of political personnel who would be used to by-pass or control incumbent career bureaucrats. Paul Light provides an example of one of the techniques explained in the manual.

in every appointment made in his administration,[81] and today partisan appointments continues unabated.

When the call came to cut 272,900 full-time equivalent employees,[82] with special focus on the managers of the bureaucracy, Vice-President Gore and the NPR excepted the political appointees from these cuts, concluding that the career middle managers were the problem in the federal government. This has two impacts on the federal bureaucracy. First, it shows a lack of confidence in the middle managers by the leadership and placed their jobs in jeopardy, with an obvious demoralizing effect on them. A second result, almost intuitively obvious, is its further concentration of political appointments in the bureaucracy as the management positions are deleted.[83] To date, 15,000 or 23% of all supervisory positions have been deleted.[84] Another effect of downsizing is the prior administration's employees may be weeded out.

The executive branch also has significant interest in maintaining control over the reform effort. Despite NPR's optimism, a knowledgeable NPR observer, Donald Kettl, made the following observation,

> The NPR report talked about the need for central management agencies to divest themselves of many of their powers, to decentralize those powers to the agencies, and thereby to empower the workers. Although this tactic is a sensible beginning, it is no basis on which to build long-term success. Practical politics suggests that, when problems or embarrassments arise from the behavior of empowered managers, as inevitably they will, demands will surface that they be prevented from ever occurring again. In the absence of stronger forces to the contrary, someone at some central office will be charged, by the President or Congress, with doing just that. Practical management also suggests that it is unlikely that the accumulated decisions of millions of empowered workers will be consistent with each other, the law, or the public interest.[85]

---

[81] *See*, LIGHT, *supra*, note 62 at p. 56; GOLDSTEIN, *supra*, note 62 at pp. 116-119. Light reports that Reagan's approval was based on two criteria, the appointee must have voted in the 1980 election and given some level of support to the Reagan/Bush campaign or a supporter of Reagan/Bush.

[82] Under the FEDERAL WORKFORCE RESTRUCTURING ACT OF 1994, the total number of full-time positions in the federal government may not exceed 1,882,3000 during Fiscal Year 1999, a reduction of 272,900 positions from a 1993 baseline. How the number 272,900 was determined is explained in LIGHT, *supra*, note 62 at pp. 30-36. The justification purportedly relies on an appropriate span of control of 1:15 as opposed to the current ratio of 1:7, but Light shows that the appropriate span of control was determined by the numbers needed to down-size the government rather than the other way around.

[83] J. CARROLL, *supra*, note 59 at p. 302. Mr. Carroll believes this concentration will be reinforced by the devolution of personnel matters from the OPM to the agencies, without further oversight of the merit system principles; but this is based on the unlikely assumption that agencies cannot responsibly manage their personnel systems.

[84] Speech of Vice-President Gore to the Nat. Asso. of Newspaper Writers on Apr. 19, 1996.

[85] D. KETTL, *supra*, note 58.

An embarrassment resulting from the reinvention effort would be a setback for the Administration and there are several approaches available to through the executive branch for maintaining control over the federal bureaucracy. The executive branch maintains managerial control through Office of Management and Budget (OMB), Office of Personnel Management (OPM), two executive agencies, and the agency heads and other political appointees. It has been said of OMB, that the "M" in OMB has generally been subsumed by budgetary considerations,[86] and its ability to provide sustained management leadership, even after being reorganized under "OMB 2000", is uncertain.[87] OMB is responsible for overseeing the CFOA and GPRA and providing guidance to several pilot programs and the agencies. OMB has a formidable task turning these statutory programs into functional management tools. Meanwhile OPM is becoming a shell of its former self[88] and under NPR, is pushing responsibility down to the agency level. The National Partnership Council (NPC) and the President's Management Council (PMC), are two advisory committees which provide guidance on federal labor-management relations and reforming the executive branch's management systems, respectively. While they seem to be paper tigers now, they are in place and can be strengthened and "empowered" depending on the outcome of the 1996 election. With no central control in the executive branch, the future of NPR's reform falls to the political appointees, the federal employees, and the Vice-President. The unions become an important factor in this equation.

President Clinton occupies a unique position. For political and practical reasons he must maintain the support of the unions as the administration pursues an agenda which adversely affects the unions. As a Democratic president, he was able to maintain the trust and cooperation of the public employee unions during the downsizing, despite a number of set-backs for the unions and their employees. One union official said, the unions' disputes with the administration are fought underground because the administration is Democratic. Had the Republicans

---

[86] *See generally*, GAO, OFFICE OF MANAGEMENT AND BUDGET - CHANGES RESULTING FROM THE OMB 2000 REORGANIZATION (Dec 1995).

[87] While initial efforts under OMB 2000 appear favorable, GAO said it remains to be seen whether the intial positive results can be sustained over the long term. GAO noted that OMB has failed in the past to coordinate its management and budget functions effectively and has not established a stable management capacity. GAO, *supra*, note 86 at p. 2-3. GAO reports can be downloaded at http://www.gao.gov.

[88] OPM has suffered the largest percentage decrease in personnel of any agency during the restructuring. Some of the loss is due to "privatizing" its training function, which was transferred to a NAFI in the Dept of Agriculture. Its investigative functions will be spun off in the future to an ESOP.

proposed the same reforms, "everything would have hit the fan."[89] As NPR enters its second phase, which looks at privatizing or terminating governmental functions, Vice-President Gore recently announced the creation of Performance Based Organizations (PBO) and OPM revealed its use of contracting-out to an Employee Stock Ownership Plans (ESOPs) to privatize its investigative function. These are alternatives concepts which are more favorable to the protection of unions and their employees than what might be considered under previous paths of privatization. So while the unions might show increasing frustration with the administration, the Clinton administration has been able to continue to offer incentives for their continued cooperation with this administration.

APPLICATION OF NPR REFORM TO LABOR MANAGEMENT RELATIONS

Having considered the players and the reform initiatives, it is time to actually consider some of the proposed changes and see how the reinvention reform has or will affect federal labor relations. The expansion of the scope of bargaining is a lightening rod whenever management and labor discuss reform issues. This really might be "much ado about nothing". If the parties truly espouse partnership in their relationship there should be little difficulty discussing issues of mutual concern, whether they are permissive or mandatory subjects of bargaining. It is when the parties are working under an adversarial arrangement that the issue is a real concern, or when management has a concern, legitimate or not, that it is losing too much control over its priorities and budget. But in these situations holding the managers accountable, choosing agency heads who agree to the administrations position, and allowing them the flexibility to bargain or not to bargain should be the most productive scheme. The real issues that need to be discussed are should we should reclassify the subjects of bargaining to better define what is or is not a management prerogative; and how should we a proposal's impact on the agency's budget and organizational priorities.

Ignoring the expansion of bargaining topics under the management rights section, NPR initiatives can have a significant effect in expanding the scope of bargaining on pay and compensation issues. The caselaw was already changing to allow negotiation on gainsharing and

[89] MIKE CAUSEY, *The Pension Pit*, THE WASH. POST, Mar. 1, 1996, at C-2, col. 1.

incentive pay and OPM has revised the rules in this area, but NPR will allow further negotiation on pay and compensation. Decentralization by OPM and enactment of the 1995 HRM Reinvention Act proposals could potentially allow negotiation of "salaries" among the agencies. There is concern as to the reach of the changes, and real adjustment of the Statute is needed to address their impact if the NPR initiatives are implemented, but the official literature and proposals fail to even acknowledge the difficulties ahead, much less address them.

The most significant impact of NPR and labor-management partnership could be in the area of privatization, which is at forefront of innovative change. This is also the area that can be driven by policy, although it is supposed to be driven by economic efficiency, and is the least settled in law or proposed legislation and rules. The consequences of privatization are especially deserving of attention because payments to outside contractors and entities consumes many times the amount that is spent on the actual operations of the federal government, and is responsible for a great deal of waste and fraud.

-- Expanding the Scope of Bargaining

Like the federal government, every state that has enacted legislation covering public sector collective bargaining has elected to exclude some topics from mandatory bargaining. When public sector labor legislation is being considered the prevalent view is that "the determination of appropriation subjects of bargaining in the public sector involves problems of the first magnitude."[90] However, one recognized authority in public labor relations, Donald Wollet, has said, "the vast literature concerning the scope of bargaining is much ado about nothing and that pre-occupation with the subject is mischievous as well as mistaken ... ."[91]

There are many different approaches to handling the scope of bargaining but the reinvention literature provides no discussion on this issue. Rather there is a top-down direction to the agencies to discuss all possible issues under a belief that partnership requires us to ignore the long standing distinctions that once existed, and that only illegal and mandatory subjects of bargaining should be recognized. Three months after issuance of Executive Order 12781, the

[90] SMITH, *State and Local Advisory Reports On Public Sector Employment Labor Legislation : A Comparative Analysis*, 67 MICH. L. REV. 891 (1969).
[91] WOLLETT, *The Bargaining Process In The Public Sector: What Is Bargainable?*, 51 ORE. L. REV. 177 (1977).

NPC advocated extending the scope of bargaining even beyond the permissive subjects listed in 5 U.S.C. §7106(b)(1)[92] and allow bargaining over the agencies' operational matters such as their right to hire, assign, direct, layoff, and retain employees, or to take disciplinary action against an employee; to assign work, to make determinations whether to contract work out, to determine the personnel who will conduct the agency's operations; and to fill positions.[93] After the 1994 election it became obvious this was not a realistic tack to take.[94] Also, there are two concepts the NPC totally ignores in pushing its union agenda. First, partnership already induces expanded bargaining without the need for legislation or direction. Second, the Federal Labor Management Relations Statute[95] was created as one whole cloth. Changing the scope of bargaining requires reconsideration of the balance between the agency's priorities and its control over its budget versus the union's right to have its proposal negotiated and implemented. It is not a simple matter of changing "may" to "shall".

When Wollett said that arguing over the scope of bargaining is "much ado about nothing" he was taking a pragmatic view of the bargaining process, one that fits well with our current partnership arrangement. The parties should be allowed to discuss any subject they agree to discuss because it is the process of communication that is important, and the interchange of interests that matters. Under partnership, it can be argued, that is what really happens now.

> Some prominent practitioners and researchers have suggested that the legal doctrine relating to scope of bargaining described briefly above have been unduly emphasized. They point to many instances where the legal doctrine rarely determined what was actually bargained. For these pragmatists, there is little practical difference between a mandatory and a permissive demand because bargaining depends upon bargaining power and pressures and not upon technical legal distinctions.
> ***
>
> This does not mean, however, that the law which defines scope is irrelevant to the bargaining process. At the very least legal scope doctrines may be used tactically by one or both parties during the bargaining process to manipulate timing and secure delays.

---

[92] *See*, NPC, *supra*, note 29, pp. 14-16. The permissive subjects are the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work.

[93] §7106(a)(2)(A),(B), and (C) (1995).

[94] The 1995 HRM Reinvention Act would have legislated the scope of bargaining found in Executive Order 12781.

[95] Title VII of the Civil Service Reform Act of 1978, codified at Title 5, Chapter 71, 5 U.S.C. §7100 *et seq.*

The partnership councils and the relationships present at the various worksites are essentially unregulated and there is no central repository to record the subjects discussed by the principals in these arrangements,[96] but it is easy to understand that a collaborative approach to solving problems can easily lead to a blurring of the boundaries surrounding issues of negotiability. What unions and management will find is that they can discuss permissive, and even illegal subjects, if there is trust and an atmosphere of cooperation exists between the parties. Whether or not these subjects will ever appear in a written agreement can become irrelevant to the parties if there is sufficient trust. By legislating the bargaining relationship suggested by the NPC, the incentive for unions to engage in partnership is lost. There are union leaders who still refuse to accept partnership or cooperation as a labor strategy. As to encouraging agencies to expand their scope of bargaining, executive orders, top-down direction, and accountability for results should persuade management to engage in partnership and discuss permissive subjects of bargaining, where it will lead to increased efficiency and effectiveness of the mission. Another reason to maintain permissive subjects of bargaining is found in one tenet behind the NPR reform, that "one size does not fit all agencies". Vice-President Gore, the NPR, and the NPC have repeatedly emphasized that flexibility is essential to improving performance in the government. Mandating a broader scope of bargaining, through legislation, may be counter-productive to a true "partnership" relationship and does not insure an "entrepreneurial" organization. It also reduces the flexibility of negotiations for the agencies.

The legislature must also consider what happens when the administration changes, as it inevitably will. The author believes partnership under Executive order 12871 will continue regardless of who controls Congress or the Presidency, but broadening the scope of bargaining will shift the tactical advantage in the labor relationship. This could lead to a further infusion of politics into the appointment of members on the Federal Labor Relations Authority and the Federal Service Impasse Panel, and perhaps countervailing legislation. None of this is necessary and a legislative expansion in the scope of bargaining is not needed.

It also raises an issue that deserves discussion, but has received no consideration. The NPR initiatives have been criticized for ignoring the politics involved in its initiatives. It is somewhat

---

[96] One current study of labor-management partnerships is found in CATHIE M. LANE, *Bittersweet Partnerships*, GOVERNMENT EXEC. p. 41 (Feb 1996).

easy to accept the short-sighted approach of NPR as it relates to improving employee performance in better serving the customer, but the bargaining relationship between the government agencies and their respective unions is an eminently political issue. The balance found in the Statute was reached after lengthy debate and represents a compromise reached between competing interest groups. To assume that the relationship can now be adjusted by simply opening the scope of bargaining without recognizing the compromises and concerns that inhered in the existing order is irresponsible and blind to the underlying bases of our democratic institutions.

Executive Order 12871

The real issue in dealing with permissive subjects of bargaining is not whether to enter into negotiations, but what will happen when the parties reach impasse; and if the matter goes to a third party what standards will guide the third party in settling the impasse. Executive Order 12871 directs the agencies to negotiate over the permissive subjects listed in §7106(b)(1), but what does that mean? If an impasse exists, the federal sector allows interest arbitration at the request of either party, through the Federal Services Impasse Panel;[97] but the federal sector also follows the private sector rule that it is an unfair labor practice to force a party to negotiate to impasse over permissive subjects of bargaining.[98] This means there is no third party arbitration of permissive subjects of bargaining, absent an agreement from both management and labor to submit the issue to arbitration.

At this date, there is no decision which addresses Executive Order 12871 directly, but on October 1995, the Federal Labor Relations Authority (the Authority) did change its analysis of proposals which fall within §7106(b)(1). Prior to that date the Authority's position was that §7106(a) limited the reach of proposals under §7106(b)(1); but in *NAGE and Veterans Affairs Medical Center, Lexington, Kentucky*,[99] the Authority changed its reasoning to bring it into

[97] 5 U.S.C. 7119 (1995).
[98] *FDIC and NTEU*, 18 FLRA 768 (1985).
[99] 51 FLRA 386, 51 FLRA No. 36, FLRA Rep. No. 871 (1995).

accord with the decision of the D.C. Circuit in *Association of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA.*[100] As a result, the Authority held:

> In view of the foregoing conclusion that matters encompassed by the terms of section 7106(b)(1) constitute exceptions to the rights set forth in section 7106(a), a determination that a proposal is negotiable at the election of the agency under section 7106(b)(1) obviates the need to also analyze the proposal under section 7106(a). Therefore, where, as in this case, parties disagree about which of these sections govern the negotiability of a particular proposal, the Authority will determine initially whether the proposal concerns matters within the subjects set forth in section 7106(b)(1). If it does, we will not address contentions that those matters also affect the exercise of management's authorities under section 7106(a). Conversely, if we conclude that a proposal does not concern matters within the subjects set forth in section 7106(b)(1), we will then proceed to analyze it under the appropriate subsection of section 7106(b). In determining whether a proposal concerns a matter within the subjects set forth in section 7106(b)(1), we will analyze whether the proposal falls within one of the two categories stated in that section. The first category relates to: i) the numbers, types, and grades; ii) of employees or positions; iii) assigned to any organizational subdivision, work project, or tour of duty. The second category relates to the technology, methods, and means of performing work. The case now before the Authority involves proposals asserted to be within the subjects in the first category. Finally, section 2424.10(b) of the Authority's Regulations pertinently provides: If the Authority finds that the duty to bargain extends to the matter proposed to be bargained only at the election of the agency, the Authority shall so state and issue an order dismissing the petition for review of the negotiability issue. Consistent with this regulation, we will dismiss the petition for review as to any proposal that is found negotiable at the election of the Agency under section 7106(B)(1). (footnotes omitted)

Thereupon the Authority dismissed the petition of the union and left unanswered the consequences of Executive Order 12871.[101] Undoubtedly labor lawyers and management counsel have already drafted legal briefs outlining their respective arguments on the obligations imposed by Executive Order 12871; but it appears to the author that nothing has changed the long standing legal position that it is an unfair labor practice to require bargaining to impasse on a permissive subject. Also, Executive Order 12871 requires the agency to negotiate proposals

[100] 22 F.3d 1150, 1155 (D.C.Cir.1994).

[101] "We construe the Union's assertion that negotiation over these proposals is mandated by Executive Order 12871 as a claim that there has been an election to negotiate, within the meaning of section 7106(B)(1). The Agency, we note, does not address this issue, which is consistent with its position that negotiation over the proposals is precluded by section 7106(a). In view of section 2424.10(b) of the Authority's Regulations, we do not address this matter further.."

covered by §7106(b)(1), but nothing in the executive order requires the agency to enter into an agreement. Another long standing rule in federal labor relations is that even if management elects to negotiate a permissive subject, it may cease negotiations any time before an agreement. The duty imposed under the definition of "collective bargaining" does not compel either party to agree to a proposal or to make a concession.[102]

When the benefits of partnership are reviewed, the opened lines of communication have generally been cited by management and labor as the stimulus for finding new ways to solving problems and improving the relationship between the parties. When presented with a proposal which may fall within §7106(b)(1), many practitioners immediately suggest taking a hard-line on the proposal; but Wollett suggests that management first determine what interests are driving the union representatives to present the proposal and see how the union expects the proposal to work.[103] This will give management three benefits: first, the union may drop the proposal once its implications are understood; second, management may learn about a problem which it must address, even if it is not an appropriate subject for negotiation; or third, the union may revise its proposal to express its real concern, which is negotiable. This is the intent of Executive Order 12781, to establish the practice of communicating and negotiating when appropriate and to prevent shutting down the lines of communication as an initial instinct.

In summary, the author believes Executive Order 12871 expands the scope of negotiability by requiring the agencies to bargain over the permissive subjects listed in §7106(b)(1), but it does not relinquish the right of management to discontinue negotiating prior to impasse. Prior to the reinvention initiative or Executive Order 12871, federal agencies were experimenting with partnership, customer satisfaction, and employee empowerment, following examples found in the private sector. The NPC and the 1995 HRM Reinvention Act propose legislation that would further expand the mandatory subjects of bargaining, mandate the creation of partnership councils at all levels of government, legislate alternative personnel systems and require their negotiation by the agencies, and introduce a new standard of review for labor negotiation. The proposals would shift the balance in negotiating power in favor of the unions without giving appropriate consideration to the long-term consequences on budgets, organizational priorities, or

[102] 5 U.S.C. §7103(a)(12) (1995).
[103] WOLLETT, GRON AND WEISBERGER, *Collective Bargaining In The Public Sector*, p. 186-87 (4th ed. 1993).

the future of labor relations. None of the proposals need to be enacted to continue reform under NPR or to continue improving the federal bureaucracy through normal processes. They would add to uncertainty, could discourage partnership by the unions, and encourage unreasonable proposals.

Pay and Compensation

Whether the union is in the public sector or private sector, the basic issues of concern to the employees are still job enhancement, job security, compensation, and fringe benefits. In the past job enhancement constituted a majority of the union's bargaining issues. Job security was of little concern, since the CSRA insured significant protection from arbitrary removals and provided a weighty and comphrensive due process path for "just cause" removals. The Federal unions were also usually prevented from negotiating wages and fringe benefits because these are established by law for most employees.[104] To the extent workplace issues are specifically provided for by Federal statute they are not included in the term, "condition of employment",[105] and thereby excluded from negotiation.[106] Additionally, the duty to bargain does not extend to matters subject to a government-wide rule and regulation, such as GSA or OPM regulations and many of the Federal Personnel Manual provisions.[107] However, as OPM repeals the FPM and slackens its regulatory control over the agencies under the reinvention process, it thereby further expands the scope of bargaining between the agencies and unions. Likewise, if changes are made to the grade structure and performance appraisal system as proposed in the 1995 HRM

[104] *See*, 5 U.S.C. Chap. 53.

[105] 5 U.S.C. §7103(a)(14)(C) (1995).

[106] There are however, several groups of employees whose salary or fringe benefits are not established by law. *See generally*, PETER BROIDA, A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW AND PRACTICE, Chap. 4, (1995). Even here the Authority recently found previously prohibited "pay" proposals are now appropriate for bargaining. *See*, *IAMAW and U.S. Dept. of Treasury*, 50 FLRA 677, 50 FLRA No. 87 (1995), *on remand from*, *U.S. Department of the Treasury, Bureau of Engraving and Printing v. FLRA*, 995 F.2d 301 (D.C.Cir.1993).

[107] 5 U.S.C. §7117. *See, supra*, note 37 and cases cited there. This does not mean the regulations are easily interpreted. In *NTEU v. FLRA*, 30 F.3d 1510 (D.C. Cir. 1994), the D.C. Circuit disagreed with the Authority's interpretation of OPM regulations which had been used to deny the negotiability of several performance award proposals. However, even the D.C. Cicuit was uncertain of the meaning of the regulation and stated, "If OPM were to issue an authoritative (and reasonable) interpretation of §430.504(d), and if the union's proposal conflicted with that interpretation of the regulation, we do not think that our decision would oblige the FLRA to order the parties to bargain over the proposal." 30 F.3d at 1516.

Reinvention Act, the changes would allow bargaining over subjects which will indirectly impact pay and compensation. These ramifications will be discussed below to show how the unions are becoming more immeshed in budgetary allocations and organizational priorities.

-- *Incentive Pay*

Incentive compensation is a high interest item in the reinvention of government, especially profit-sharing or gainsharing. The NPR made it clear that it believes these incentives must be encouraged in public agencies.[108] While encouraging incentive programs, the NPR also understood that pay for performance programs had produced mixed results in both public and private sectors, and that there is insufficient empirical evidence to show that pay for performance programs are effective.[109] Noting the difficulties with pay for performance programs, it pointed to 18 gainsharing programs in DoD which reported cost savings and indirect savings, such as less sick leave and overtime.[110] The gainsharing programs were called a "promising but relatively little-used approach to linking awards with improved performance."

In the past federal regulations made a distinction between performance awards, covered in 5 C.F.R. Part 430, and incentive awards, covered in 5 C.F.R. Part 451. This distinction was removed by recent revisions, but it is useful to remember the distinction to understand past union proposals and the place for NPC recommendations. The NPC recommended the establishment of incentive programs which rewarded employees who meet performance expectations, as well as gainsharing programs.[111] In the past, unions often proposed that performance awards be granted on the acheivement of a particular performance rating, for example, a "fully successful" employee would receive $200. It will be explained below that nondiscretionary performance awards were generally found nonnegotiable by the Authority.

---

[108] Its human resource recommendations included HRM04 - Authorize Agencies to Develop Incentive Awards and Bonus Systems to Improve Individual and Organizational Performance. NPR, REINVENTING HUMAN RESOURCE MANAGEMENT - ACCOMPANYING REPORT TO FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS - (Sept. 1993).

[109] *Id.* at p. 37, referring to GAO and MSPB observations. Consider a recent study, DENNIS DALEY, *Pay-for-Performance and the Senior Executive Service: Attitudes About the Success of Civil Service Reform*, AM. REV. PUB. ADMIN. 355 (Dec 1, 1995).(No relationship found).

[110] *Id.* at p. 36.

[111] NPC, *supra*, note 29 at p. 37.

The regulations covering incentive and performance award plans was decentralized in August 1995, as part of the "reinvention" process. [112] OPM deleted the 5 C.F.R. Part 430, Subparts D and E,[113] dealing with performance awards based on an employee's performance rating and integrated these sections into the 5 C.F.R. Part 451. It decentalized the rules and explicitedly acknowledged gainsharing plans,[114] giving authority to the agencies to establish the plans and allow awards up to $10,000 per employee with approval at the agency level. The regulation encourages negotiation of the plans with the affected employees.[115]

The caselaw regarding negotiation of performance and incentive plans[116] has been evolving since the 1980s to allow greater negotiation. Initially finding the proposals non-negotiable, the Federal Labor Relations Authority (the Authority) has altered its position over time and now generally finds these subjects negotiable, even in direct defiance of the Fourth Circuit. At first, agencies argued that performance and incentive awards were "pay" or otherwise provided for by Federal statute and therefore not a "condition of employment" as defined in §7103(a)(13)(C), or within its management prerogative to direct employees and assign work because the awards would set levels of performance for the work assigned by the agency.[117] The Authority decided these issues in favor of negotiation in *NTEU and IRS*,[118] after its contrary ruling was reversed by the D.C. Circuit.[119]

The agencies' arguments then shifted to limitations imposed by government-wide regulations and the effect the proposals would have on the agency's right to determine its budget. Prior to the 1995 revision of the regulations, both Part 430 and Part 451 contained provisions which

---

[112] Amendment of parts 430, 432, 451, and 531 of Title 5, Code of Federal Regulations, 60 FR 43936, August 23, 1995, effective September 22, 1995.

[113] 5 C.F.R. §§430.501 through 430.506. (1994).

[114] 5 C.F.R. Sec. 451.104(a)(1) provides: An agency may grant a cash, honorary, or informal recognition award, or grant time-off without charge to leave or loss of pay consistent with chapter 45 of title 5, United States Code, and this part to *an employee, as an individual or member of a group*, on the basis of a suggestion, invention, superior accomplishment, *productivity gain*, or other personal effort that contributes to the efficiency, economy, or other improvement of Government operations.

[115] Agencies are encouraged to involve employees in developing such programs. When agencies involve employees, the method of involvement shall be in accordance with law. 5 C.F.R. sec. 451.103(b), 60 FR 43936, August 23, 1995.

[116] Incentive pay arrangments discussed will include the profit-sharing and gainsharing arrangements allowed under 5 U.S.C. Chapter 45 and 5 C.F.R. Part 451.

[117] The agencies also argued that these awards were a means or method of performing work. That argument was rejected as well; but since that subject is a permissive subject of bargaining making the argument in face of E.O. 12871 it loses even more of its utility as a shield to negotiation.

[118] 27 FLRA 132 (1987).

[119] *NTEU v. FLRA*, 793 F.2d 371 (D.C. Cir 1986), *reversing*, *NTEU and IRS*, 14 FLRA 463 (1984).

required the awards to be reviewed and approved at a mangement level higher than the level recommending the award.[120] The Authority relied on these "review and approve" provisions to find mandatory performance awards nonnegotiable.[121] Over time the refuge given to the agencies by these arguments contracted as the D.C. Circuit rejected the Authority's interpretation of OPM regulations[122] and the Authority restricted the reach of its own tests, refusing to follow the Fourth Circuit.[123] In *NTEU v. FLRA*,[124] the D.C. Circuit disagreed with the Authority's interpretation of the "review and approve" regulations and found a union proposal negotiable, even though it proposed that all employees receiving "fully successful" in their annual appraisals would get a $250.00 award, at a minimum, with amounts increasing to $500 and $1,000 for higher performance ratings. This issue has been overcome by the new regulations which do not have the "review and approve" restrictions.

Of more interest, and the one on which we should focus, is the issue of management's control over its budget and its determination of the agency's priorities. The Authority's decisions on the "review and approve" regulations began with a Fourth Circuit decision, *Dept. of the Air Force, Langley Air Force Base v. FLRA*,[125] which reversed the Authority's finding of negotiability concerning a union proposal which mandated cash awards of varying salary percentages to employees dependent on the employee's performance ratings in a five-step performance rating

---

[120] 5 C.F.R. §430.504(D) (1994); 5 C.F.R. §451.104(e)(3) (1994).

[121] *NFFE and USDA, FCIC*, 48 FLRA 552, 48 FLRA No. 54 (1993)("In addition, we note that in any event, both 5 C.F.R. §430.504(D) and 5 C.F.R. s 451.104(j) require that a decision to grant, respectively, performance awards or incentive awards be subject to review and approval by an official of the agency at a higher level than the official who made the initial decision. 5 C.F.R. s 430.504(D), which is a Government-wide regulation, requires agency officials to review and approve determinations to grant cash performance awards as well as the amount of such awards. *National Federation of Federal Employees, Local 1482 and U.S. Department of Defense, Defense Mapping Agency, Hydrographic/Topographic Center, Louisville Office, Louisville, Kentucky*, 45 FLRA 1346, 1350 (1992) (Defense Mapping Agency). Proposals that mandate the granting of cash performance awards are inconsistent with 5 C.F.R. §430.504(D) because they prevent an agency from reviewing and approving those awards. *Id.* at 1351." 48 FLRA at p. 561); *NFFE and Defense Mapping Agency*, 45 FLRA 1346, 1350 (1992); *NAGE and Dept of Navy, Newport News*, 43 FLRA 47, 43 FLRA No. 3 (1991).

[122] *See, supra*, note 107.

[123] *See, Social Security Admin. v. FLRA*, 983 F.2d 578 (4th Cir. 1992), *reversing in part*, 41 FLRA 224 (1991), and *NAGE Local R14-52 and Dept of Army, Red River Depot*, 48 FLRA 1198 (1993). The Authority has restricted the breadth of the first prong of its two-prong *Wright-Patterson* test, which is used to determine whether a proposal impermissibly infringes on the agency's right to determine its own budget.

[124] 30 F.3d 1510 (D.C. Cir. 1994).

[125] 878 F.2d 1430 (Table, Case No. 88-2171), 146 L.R.R.M. (BNA) 3088, 1989 WL 74869 (1989)(Because this is an unpublished decsion, Fourth Circuit rules do not allow it to be cited as precedence).

system. The Fourth Circuit found the proposal violated a government-wide regulation,[126] but for our purposes its alternative, and first stated basis, for the reversal was the reasoning:

> "We think it clear that NAGE's proposed mandatory payments for performance ratings bear on the right of the Air Force management to determine its own budget. ... . It is clear that management's reserved right to establish its own budget is constrained by the separate mandatory expenditures required by the performance rating bonuses. On oral argument before this Court, counsel for the FLRA even agreed that reallocation of sums budgeted to hardware, such as aircraft, might be required in order to meet the mandatory bonus payments. For these reasons the proposal would "directly interfere" with the Air Force's determination of its budget, a right reserved to it by Section 7106."[127]

The thesis of this paper is that the reinvention process is not an adequate vehicle for reforming federal labor relations. One reason is because the Federal Labor-Management Relations Statute never did adequately address the effect of negotiations or union proposals on the ability of the agency to set its budget or determine its organizational priorities, leaving this to be resolved by caselaw. The caselaw shows an attempt over the years to find some balance between meaningful collective bargaining and these fundamental rights of the agency. Simply opening the areas for bargaining as proposed by the NPC and 1995 HRM Reinvention Act is short-sighted and does not strike any reasoned balance that will bring certainity or responsibility to federal labor relations.

In *AFGE and AFMC, Wright-Patterson AFB*,[128] the Authority developed a two-prong test to determine whether a union proposal directly interfered with management's right to determine its budget. Under the *Wright-Patterson* test, to avoid negotiating a union proposal, the agency must show the proposal either (1) results in a requirement that the program or amount be included as a separate item in the agency's budget; or, (2) it causes an increase in costs that is significant and unavoidable and not offset by compensating benefits. The test was revisited in *NAGE Local R14-52 and Dept of Army, Red River Depot*,[129] where the Authority plainly stated that it would refuse to follow the Fourth Circuit's interpretation of the *Wright-Patterson* test. The Authority then restated the test so that the first prong would require the proposal to directly require a specified

---

[126] Specifically, the Fourth Circuit found it violated the regulatory prohibition on considering factors other than merit and the requirement for administering awards within existing funds, not a "review and approve" provision.
[127] *Langley Air Force Base, supra*, note 123 at p.2.
[128] 2 FLRA 604 (1980).
[129] 48 FLRA 1198 (1993).

amount in the agency's plan to fund its programs and operations during a fiscal year.[130] In essence the first prong is written out of the test except for inartful unions negotiators.

The Authority said,

> As an illustration of this distinction, a proposal requiring that an agency pay a specified amount toward health benefits premiums for bargaining unit employees would not be inconsistent with the first part of the budget test. However, a proposal requiring that the agency place a specified amount in its budget for the purpose of funding health benefits premiums for bargaining unit employees would.[131] (supporting citations omitted and included in footnote).

In *Red River Depot*, the union proposed that labor savings[132] over the fiscal year be divided 50/50 between management and the employees. In the first round, the agency argued that since it no longer has a gainsharing program, the proposal would require the establishment of one and therefore directly interfere with the agency's right to determine its budget. The Authority noted that while the proposal would require the Agency to reestablish gainsharing as an administrative program, the proposal did not, by its terms, mandate any budgetary action. On remand, an issue arose over the establishment of the baseline because a baseline which was not based on actual costs and adjusted each year could require a separate accounting for the profit sharing.[133] The Authority was able to avoid having to decide this issue by finding that the Authority had unilateral discretion to set the base-line based on past performance of the employees. "As long as a proposal leaves the agency with the discretion to determine how any

---

[130] 48 FLRA at 1206-07. It is recommended that the practitioner in federal labor relations read the whole opinion.

[131] *Id.* Citations omitted above are: "*Compare Air Logistics Center, Sacramento*, (proposal that agency would bear the entire burden of an increase in health benefits premiums and reimburse employees who had paid the increased premiums was not inconsistent with the first part of the budget test) with *National Association of Government Employees, Local R1-144, Federal Union of Scientists and Engineers and U.S. Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island*, 38 FLRA 456, 477-80 (1990), *remanded as to other matters without decision*, No. 91-1045 (D.C.Cir. July 23, 1991) (proposal requiring that 1.5 percent of base aggregate payroll be allocated in the budget for awards directly interfered with management's right to determine its budget based on the first part of the budget test) and *Norfolk Naval Shipyard*, 38 FLRA at 1594-96 (proposal prescribing the maximum amount that could be included in the budget to fund performance awards directly interfered with management's right to determine its budget). In sum, under this part of the test, a proposal that directly prescribes the items or amounts that will be specified in an agency's plan to fund its programs and operations during a fiscal year interferes with the agency's right to determine its budget."

[132] Savings = Man-hours saved x Labor rate. Sharing - 50/50 split employee and depot. Payouts--Equal for everyone, quarterly separate payroll checks, $25 minimum.

[133] "More specifically, the [Circuit Court] stated that a conclusion with regard to whether the proposal requires the inclusion in the budget of a particular program or amount might be dependent upon whether or not the Agency retained the ability to adjust the baseline productivity level each year to reflect prior productivity gains." *Id.*

necessary funding relating to an administrative or operational program will be addressed in its budget, that proposal is not inconsistent with the first part of the budget test."[134]

It has to be remembered that the Fourth Circuit disagrees with a narrow interpretation of the first prong, which reduces it to a legalistic shield useful only against proposals submitted by unions who have inartfully failed to correctly phrase their proposal. The dispute between the Fourth Circuit and the Authority really relates to the balancing reached by the two tribunals. Every observer has to acknowledge that most proposals submitted by a union will impact the agency's budget and draw funding from other programs or projects. The Authority's view is that an expansive view of management's right to determine its budget would sharply curtail the scope of collective bargaining, while the Fourth Circuit believes the narrow test ignores the practical economic realities of these proposals.

This is not unlike the problem faced by state legislatures which have enacted an expansive scope of bargaining. State agencies will often negotiate an obligation of funds, usually on pay raises or fringe benefits, which later are not appropriated by the state legislatures. There are several alternatives adopted among the states on how to handle this problem; but there is no solution satisfactory to all parties, especially when it is realized the solutions still require distributing the same limited tax receipts to several competing programs and priorities, and someone's program or priority must lose. The NPR initiatives totally ignore this dilemma when they urge expansion of bargaining rights (as discussed in the above section) and slackening the control over the compensation of employees to provide more market-oriented incentives for performance. The *Wright-Patterson* test is not an adequate solution to settle the disputes after expanding the scope of bargaining.

Whether or not the proposal requires a "line item" in the agency's budget can become meaningless in making priority and allocation determinations, and this is recognized by the second prong of the *Wright-Patterson* test, which makes a balancing determination. In *NTEU and. NRC*,[135] the Authority acknowledged that the second-prong requires an examination of the merits of the proposals.[136] The union had made an argument that the second prong be "jettisoned" in its entirety; but the Authority recognized some balancing test is needed and it

[134] *Red River Depot*, 48 FLRA at 1209.
[135] 47 FLRA 980 (1993).
[136] 47 FLRA at p. 998.

responded to the union's argument by concluding that the second prong "continues to offer a reasonable solution to the tension that exists between the management rights provisions of the Statute and the promotion of genuine collective bargaining over meaningful issues." Under the second prong, the Authority weighs the cost to the agency against the compensating benefits received in return, without considering those intangible nonmonetary benefits, such as positive employee morale. The "tangible" monetary benefits considered by the Authority in *NTEU and NRC*, included a reduction in employee turnover, a lower number of grievances, improved employee performance, and increases in productivity.[137]

The second prong recognizes that some proposals have costs ramifications of such significance that they, in effect, determine the agency's budget.[138] What is missing in this equation are the "costs" associated with shifting funds from a priority program to fund the union proposal. If the Authority is going to allow jockeying of the budget, then the parties should be required to determine where the funds for the proposal exist and what programs will have less funds and how that will impact the mission of the agency. Realistically, this may be impossible, but it would show not only how the proposals affect the budget as a percentage, but how it affects the mission of the agency and management's ability to conduct its operations. The agency argued in *NTEU and NRC* that the pay proposal infringed on the agency's ability to determine its mission. The Authority answered that the impact was not caused by the union's proposal but by some future action. "As to the Agency's concerns that the FSIP may issue decisions that infringe on its management right to determine its mission, we note that if, as a consequence of future negotiations, the FSIP issues a decision that imposes a provision that the Agency believes is inconsistent with its management right to determine its mission, there are avenues available for challenging such action."[139] However, this also reduces the balancing test to a arbitrary exercise if all the Authority does is calculate the cost of the proposal as a percentage of the agency budget, without making a realistic assessment of the proposal's true impact on the agency. Attempting realistic assessments may inmesh the Authority in the affairs of the agencies, but it is

[137] It makes one wonder whether this analysis benefits a union willing to file numerous grievances in the short-term in order to justify a proposal in the future.
[138] 47 FLRA at p. 998.
[139] *Id.* at p. 994

too late to withdraw from that responsibility which began when it introduced the *Wright-Patterson* test.

There are other problems associated with profit-sharing, besides their negotiability. A few considerations the parties must address in their negotiations are: the effect incentive pay will have on base rates for overtime calculations, the baselines that will be used and how these baselines can be manipulated; the employees who will be covered; whether the top performers deserve more than the worker who just did his or her job; when the entitlement will be determined; what percentage must be allowed to account for returned work or other risks; and what programs and priorities will not be funded. The agencies and unions will need training to develop the expertise. In times of tight budgets, this may easily be ignored as a "nice to have", when in reality this training is essential. These issues should not be proposed and negotiated causally.

Determining the employees who will be covered by the proposal becomes significant following the Authority's decision in *AFGE and OPM.*[140] In *AFGE and OPM*, the Authority found that a union proposal is outside the duty to bargain if it does not concern conditions of employment of bargaining unit employees. The Authority considered three types of bargaining proposals: (1) those that directly implicated unrepresented employees and nonemployees; (2) those that directly implicated employees in other bargaining units; and (3) those that directly implicated supervisory personnel. In the first category, the Authority has applied the "vitally affects" test. With regard to proposals directly implicating employees in other bargaining units or supervisory personnel, the Authority concluded that the "vitally affects" test does not apply and, accordingly, that such proposals are outside the duty to bargain. The Authority also decided, in reviewing the proposals, it would no longer rely on what the union seeks to accomplish rather than what the proposal would, in fact, accomplish, when the two are inconsistent, in determining whether a proposal concerns a condition of employment of non-unit employees. This raises some issues concerning a profit-sharing plan which covered all employees in the organization, such as the one considered in *Red River Depot*. But limiting the proposal solely to the bargaining unit members ignores the "me too" attitude of unions and employees and the foreseeable probability that an incentive pay proposal will be expanded to all

[140] 51 FLRA 491, 51 FLRA No. 42 (1995).

the employees in the affected unit. Currently the "me too" argument is not persuasive with the Authority.

The issues discussed above show that Federal labor relations was evolving on its own to expand the negotiability of topics through the adoption of innovative management practices, as shown by the 18 DoD incentive award programs or the change at Red River Depot when the new commander arrived at his station impressed with private sector innovations. NPR made the risk-taking acceptable and actually encouraged it, but it is legitimate to wonder whether the NPC's proposals are needed. The OPM has revised its regulations on awards and incentive pay to encourage these programs.[141] All of this diverts our attention to encouraging the agencies to negotiate incentive pay programs with the unions, before addressing the underlying issue, what are management's rights in determining its budget and setting its priorities, which ultimately determine the mission of the agency.

-- Other Issues of Compensation

There are other areas of compensation which remain closed to union negotiation and it is only through the reinvention initiatives that these areas may be opened.[142] The Federal employee unions have always lobbied for pay comparability, and achieved some success through the years with enactment of corrective legislation, such as the Federal Employee Pay Comparability Act of 1990 (FEPCA). The FEPCA required the government to close the Federal/non-Federal pay gap within a certain time period and institute locality pay for high labor cost areas. It also allowed special recruitment and retention bonuses.[143] There has never however been agreement on comparable rates. This has resulted in a constant upward pressure on other determinatives of pay as the employees and the unions seek what they believe is a comparable rate.

---

[141] It is interesting that the revised regulations deleted the prohibition that the awards program not be used as a substitute for pay. See, 5 C.F.R. §104(d) (1995)("An award under this part shall not be used as a substitute for other personnel actions, or as a substitute for pay.")

[142] The analysis of "pay established by statute" was recently revised under *IAMAW and U.S. Dept. of Treasury*, 50 FLRA 677, 50 FLRA No. 87 (1995), *on remand from, U.S. Department of the Treasury, Bureau of Engraving and Printing v. FLRA*, 995 F.2d 301 (D.C.Cir.1993), to allow for expanded negotiation.

[143] Federal law actually states that it is the policy of Congress in setting pay for Federal employees that Federal pay rates will be comparable with non-Federal pay rates for the same level of work within the same local pay area and any existing pay disparities between Federal and non-Federal employee should be completely eliminated. 5 U.S.C. §5301.

One phenomena has been grade inflation. Ronald Johnson and Gary Libecap contend there is a prevalent practice in the civil service for supervisors to inflate the grade levels of their employees in respond to pressure from the employees to compensate for departures from pay comparisons in the local area.[144] They cite studies by OPM and Congressional Budget Office (CBO) which acknowledge the problem of grade inflation and other data which shows a creep of the average GS level for federal employees from an average GS grade of 8.16 in 1980, to 8.39 in 1984, to an average grade of 8.69 in 1989.[145] While, some of the grade creep for the period can be attributed to the growing professional layer in the Federal government which generally groups in the higher GS levels; Paul Light gathered raw data for the GS 1-10 employees, and it showed a grade creep from 8.06 to 8.53 to 8.91 for the period from 1983 to 1989 to 1992, respectively.[146] The contention that grade inflation exists is further supported by a recent GAO study which was conducted to determine if women and other minorities were being classified at lower grades than the general workforce for the same work. The study found some discriminatory differences,[147] but it also found that generally everyone's grade, including minorities and women, was overrated.

The implementation of the FEPCA also shows the same upward pressures. To retain specially qualified employees, the FEPCA authorized the agencies to pay retention allowances to these employees. The retention allowance was intended to be used only to retain highly skilled employees who would otherwise resign to take a higher paying job in the private sector. Since 1990 five agencies have used the benefit, with increasing numbers each year. In 1991 four

---

[144] RONALD N. JOHNSON AND GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY, p. 139 (1994).

[145] *Id. See also,* GREGORY B. LEWIS AND SAMANTHA L. DURST, *Will Locality Pay Solve Recruitment and Retention Problems in the Federal Civil Service*, PUB. ADMIN. REV., pp.371, 372 (Jul/Aug 1995)(citing studies demonstrating grade inflation in civil service).

[146] PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY, p. 75, Table 3-2, *Number of Government Employees and the Ratio of Supervisors to Subordinates, 1983, 1989, and 1992*, (1995). In this particular table, Paul Light was concerned with the span of control. His raw data showed the workforce of GS 1-10 declined during this period, while the greatest increase in Federal personnel occurred in the GS 11-15 compartment. Paul Light attributed the change to a new occupational mix in the workforce and a hollowing out phenomenon. *Id.* at p. 75.

[147] GAO, FEDERAL JOB CLASSIFICATION: COMPARISON OF JOB CONTENT WITH GRADES ASSIGNED IN SELECTED OCCUPATIONS (Letter Report, 10/95). Regarding discriminatory practices, the study found that the likelihood of a position being overgraded increased as the incumbents' GS grades increased, occupations with high female representation were more likely to be undergraded than those occupations with medium or low female representation; and occupations with high minority representation.were more likely to be overgraded than those occupations with medium or low minority representation.

employees in the entire Federal government received the retention allowance; by 1994, 374 employees were receiving it.[148] This would be a minuscule number and unremarkable except for the situation found at the Export-Import Bank (Ex-Im Bank). From 1990 to 1993, Ex-Im Bank did not use the allowance; then in 1994, it provided the allowance to 100 employees and by August 1995, 200 employees or 45% of the bank's employees were receiving the allowance. In doing further research, OPM found Ex-Im Bank not only improperly paid the retention allowances, but also failed to properly handle its cash awards, pay raises, and recruitment bonuses.[149] As a result the Ex-Im Bank hired an outside expert to correct the problem. There is nothing wrong paying 45% of the employees a retention allowance, if it is justified;[150] but over time there wiil be an upward pressure to grant pay raises through FEPCA allowances. And the situation is not an isolated one. Recently President Clinton ordered greater oversight of bonuses awarded to executives of federal corporations after learning of plans to award hundreds of thousands of dollars to its top executives.[151]

As the administration attempts to regulate the pay of its top employees, it is also controlling the raises normally due to the employees. In the 1997 budget, President Clinton provided the federal employees a pay raise of 3%, well below the 7 to 8 % which would have been required by the FEPCA. Administration officials argued that "it makes no sense, in tight budget times, to strictly follow the law when the government is downsizing and the pool of applicants for federal jobs is plentiful."[152] The administration is now considering a new total compensation approach when comparing federal pay with private pay, because the current approach only looks at salaries, and ignores the favorable fringe benefits given the federal employee, such as the retirement plan.[153] A GAO study noted that academic studies have found that pay levels for the federal employees are higher than those for employees in the private sector with comparable characteristics, such as education and work experience, and the government's methodology is generally criticized as being defective.[154] One academic study focusing on locality pay showed

---

[148] GAO, RETENTION ALLOWANCES: USAGE AND COMPLIANCE VARY AMONG FEDERAL AGENCIES (Dec 95).
[149] STEPHEN BARR, *Export-Import Bank Overpaid Salaries*, THE WASH. POST, Feb. 1, 1996, A-19, Col.4.
[150] A private study apparently found that the bank's specialists could earn 35 to 95 percentage more in private industry. MIKE CAUSEY, *Special Pay Packages*, THE WASH. POST, Mar. 29, 1996, B-2, Col. 1.
[151] *Clinton Limits Executive Bonuses*, GOVERNMENT EXECUTIVE, p. 6 (Dec. 1995).
[152] STEPHEN BARR, *Clinton Plan To Set 3% Pay Raise*, THE WASH. POST, Feb. 3, 1996, pp.A-1, A-4, col. 1.
[153] THE WASH. POST, March 31, 1996, p. B-2, col. 1.
[154] GAO, FEDERAL PERSONNEL: FEDERAL/PRIVATE SECTOR PAY COMPARISONS (Chapter Report, 12/14/94).

that private sector pay had little effect on entry levels, promotion grades or current grades of the federal employees, and that there was little empirical evidence to show a significant connection between locality pay and recruiting or retaining employees.

The bottom line after reviewing studies on grade inflation and pay comparability is that employees are attracted or deterred from federal service for reasons other than the salary, as shown by the pay comparability studies; however, promotions and salary increases are used by supervisors as an incentive to possibly motivate their employees or out of peer pressure. What does this mean for federal labor relations? There is an NPR initiative to allow agencies to utilize broadbanding of the GS classifications. A potential classification system allowing agency-specific broadbanding is outlined in the 1995 HRM Reinvention Act. Under that proposal, the GS grade classification system established by statute would be abolished, but the present pay structure would be retained. OPM would have authority to establish grade level criteria by regulation. A new subchapter would also be inserted in Title 5 to authorize OPM to establish government-wide broadbanding criteria. OPM would then have the authority to approve broadbanding programs submitted by the agencies for all or part of their organizations, provided they met the government-wide criteria.

Extrapolating from past experience with grade inflation and pay comparability, there are some legitimate questions regarding the benefits of broadbanding. The general consensus is that the employees will begin to congregate at the top of their pay bands relatively quickly, unless there is some external control or internal discipline. GAO's review of past broadbanding experiences caused it to evidence some reservations concerning implementation of broadbanding government-wide.[155] The GAO was concerned because salary costs tended to be higher under a broadbanded system; the tests were too limited to lead to a conclusion that broadbanding is appropriate government-wide; and no controls had been adopted to insure that federal employees doing the same work in the same local area will receive essentially the same pay, regardless of the agency at which they work.

Legislation to allow broadbanding was proposed in the past, but never enacted. While NPR raised several faults arising from the rigidity of the current classification system; NPR also

[155] GAO, MANAGEMENT REFORM: IMPLEMENTATION OF THE NATIONAL PERFORMANCE REVIEW'S RECOMMENDATIONS, p. 419 (December 1994); GAO, MANAGEMENT REFORM: GAO'S COMMENTS ON THE NATIONAL PERFORMANCE REVIEW'S RECOMMENDATIONS p. 220 (Dec 1993).

recognized that broadbanding does not appear to be the panacea for every organization. "[Broadbanding] carries its own set of challenges and may not be a good fit for every organization or every occupational group."[156] The NPR acknowledged that the concerns of GAO are real. Broadbanding can lead to increased salary costs unless the organization has managers skilled at managing employee's pay, an effective performance management system, and budget controls. But obtaining classification and pay flexibility can be a tremendous temptation for an agency, which believes it can discipline its managers in managing the pay and control the salary creep, especially if it is being pressured by the unions and innovative political appointees to adopt the new system. Whether Congress will trust this classification system to the agencies remains to be seen. Our focus now is what are the consequences to our labor relations.

Executive Order 12871 directs the agencies to negotiate the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work projects, or tour of duty. The Authority has yet to define the union's ability to determine the "numbers, types, and grades of employees" under §7106(b)(1). Although there are cases defining the terms, these cases generally determined the boundary protecting management's rights from interference, not how far the union's negotiating rights extend.[157] These two lines are not the necessarily the same.

A additional complication in this area is found in the definition of "condition of employment" which excludes any policy, practice, and matter relating to the classification of any position.

Peter Broida in his treatise on Federal Labor Relations indicates:

> "Congress intended to remove from the scope of bargaining threshold determinations of what duties and responsibilities constitute a given position and the characterization of that position for purposes of personnel and pay administration. The bargaining exclusion was intended to ensure uniformity of position classification throughout the federal service. For that reason, bargaining proposals directly relating to the

---

[156] NPR, *supra*, note 109 at p. 23.

[157] *See*, PETER BROIDA, A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW & PRACTICE, (1995). In *NAGE Local R1-109 and VAMC, Newington*, 38 FLRA 211 (1990), the Authority said, although it has not expressly defined "types" of employees, it has in many cases discussed, in general, management's right to determine numbers, types, and grades of employees, and in particular, the right to determine types of employees. "Examination of those cases supports a conclusion that management's right to determine the 'types' of employees assigned to organizational subdivisions, work projects, or tours of duty, encompasses the right to make determinations based on work or job-related differences between employees... ."

classification of positions do not concern 'conditions of employment' and they are not within the duty to bargain."[158]

If broadbanding is introduced, it remains to be seen how this exclusion from bargaining will be addressed. The government-wide criteria for the classifications will be made at the OPM, with the agencies permitted to develop their own broadbanding programs, presumably allowing some flexibility to create bands appropriate for their organizations. Generally, agency level rules and regulations are bargainable; unless the agency can show a compelling need for the rule or regulation.[159] This is an elevated standard which is infrequently met by the agencies. If the agency relies on the exclusion under §7103(a)(14) for matters related to classifications, it is uncertain how this issue will be decided.

Once broadband classification becomes optional, unions who believe it is advantageous to their employees will want to negotiate its implementation. When all of the consequences are considered, federal employee unions may soon be negotiating the employees' salaries with the agencies. If the recommendations of the 1995 HRM Reinvention Act are enacted, the unions will be able to negotiate manning and staffing, incentive pay, performance standards, and a broad band classification system. While these components do not legally constitute "pay", they do set salaries indirectly. It remains to be seen at what level bargaining over these issues will occur, but the majority of the agencies and the unions have no experience in either creating these programs or bargaining over issues related to them. As the GAO and the NPR acknowledge, there are a number of difficulties here.

The piecemeal and politically-driven approach of the reinvention initiatives to labor relations reform is injurious to long term stability in labor relations. The caselaw identifies the real tensions developing in labor relations; one of which is the ability of the agencies to prioritize funding and determine their budgets versus the unions' ability to negotiate proposals which necessarily impact the agency's budgetary decisions. This is especially important as funding for the operations of some agencies becomes more scarce each year. Merely opening the subjects listed in §7106(b)(1), such as manning and staffing, for mandatory negotiation does not address these tensions or introduce efficiency in government operations. It may appease the unions for a

---

[158] *Id.*, citing, *March AFB, Riverside, CA and AFGE Local 1953*, 13 FLRA 255 (1983).
[159] 5 U.S.C. §7117(a)(2) (1995); 5 C.F.R. §2424.11 (1995).

short time during this period of downsizing, but it shows no fore-thought to the long-term consequences.

The boundaries meant to protect management from negotiating proposals to impasse should not translate into the same boundaries which show the breadth of the union's ability to negotiate issues. If the bargaining boundaries in federal labor relations are going to be adjusted, then §7106 should be reviewed in its entirety, not in a piece-meal approach; and perhaps the entire Statute should be reviewed. Efficiency in the government is advanced by certainty in the rights of the parties. Unsettled definitions of the parties' rights will breed litigation, or lead to extreme bargaining positions hoping for a compromise in the uncertain areas of the law.

Downsizing - Privatization, Contracting-Out, and Other Options

A great deal has been written about the "shadow government" which has been created to provide federal government services. Mark Goldstein put it simply when he said, "both Republican and Democratic presidents have become adept at political sleights of hand: They have provided programs demanded by voters while holding federal employment steady so that no one might accuse them of making government bigger. Shadow Government is the sorcery that allows administrations to manage this feat."[160] The "sleight of hand" is performed through privatizing and contracting-out, which are often jumbled together as privatization.. Fredrick Mosher estimated that only 5 to 7 percent of all federal spending was spent on activities that the federal government performed itself, after excluding funds allotted to the armed forces,[161] John Sturdivant, National Vice-President of the AFGE, estimated the shadow employee workforce to be equal in size to the two million federal employee workforce.[162]

In December 1994, the administration announced the beginning of NPR Phase 2, bringing the focus to cutting the government back to its essential services. To have influence on which services are retained within the government or spun out is a valuable privilege for the unions.

---

[160] MARK L. GOLDSTEIN, AMERICA'S HOLLOW GOVERNMENT, p. 146 (1992).
[161] NEWLAND, *supra*, note 62 at p. 112, quoting FREDERICK C. MOSHER, *The Changing Responsibilities and Tactics of the Federal Government*, PUB. ADMIN. REV., pp. 541-548 (Nov/Dec 1980).
[162] Testimony of John Sturdivant, *The Federal Role in Privatization, Hearings Before the Subcommittee on Government Management, Information, and Technology of the Comm. on Government Reform and Oversight*, 104th Cong., 1st Sess., p. 96 (1995).

When Robert Tobias, National President of the NTEU, was confronted regarding the union's continued cooperation with the administration, he responded that the employee cuts were inevitable and it better to be inside helping to steer, and brake, the train, rather than outside standing in front of it.[163] He understood another administration would not give the unions the same access or influence that they are given today. This access is extremely valuable when one stated objective of the current administration, and the purpose behind NPR Phase 2, is cutting programs. Employee involvement has also been found to be a major factor in the eventual success of privatization. "If the employees believe that management is at least considering their interests, then they will 'buy in' to the process to a greater extent which in turn ensures that the privatization has a greater chance for success."[164]

Basically there are five ways to downsize the federal government.[165] These basic ways are: Service Termination;[166] Privatization;[167] Quasi-Government Corporations;[168] Public/Private Partnerships;[169] and Competition/Contracting-out.[170] One out of several unique features of the

---

[163] MIKE CAUSEY, *supra*, note 69.

[164] Prepared Statement of Andrew Jones, Worldwide Privatization Coordinator, Arthur Anderson in COMMITTEE REPORT, *supra*, note 162 at p. 24 (1995).

[165] NPR and OMB, PRIVATIZATION RESOURCE GUIDE AND STATUS REPORT, (Feb. 13, 1995).

[166] "This approach reflects a government review of the existing commercial, State or local government service market and a decision that a service need not be provided by the federal government. This option includes many federalism concepts. Electrical power generation and distribution (rural electrification), and helium production and sales are also examples of services that fit into this category." *Id.*

[167] Privatization implies that the government is currently providing the service, but no longer sees the need to be in direct control of its provision, operations or maintenance. Privatization reflects the sale of assets and related service requirements (rights) by the government. However, it also includes assumptions that services are necessary and must be provided in the future. It is rarely simple divestiture, as outlined above. The sale agreements themselves establish and refer to the regulatory and oversight environment that will continue to exist to assure that public and/or agency access and service requirements are maintained. This may or may not include agreed-upon user fees or rate commission (utility) oversight. Privatization can include sale to or forgiveness of debt from other public authorities or to private sector investors. Simple examples include waste water treatment plants, airports, ports, bridges, parks, and recreation facilities. Government exerts control through regulatory and sale covenants." *Id.*

[168] "This approach recognizes that there is a definite public need for a service at the federal level. Generally it is a service that can readily be provided by the private sector, but there is no commercial service market able or willing to take on the responsibility. In effect, instead of providing the service directly as a public (in-house) good, the government opts to create a corporation and a market where there is none today. Fannie Mae, Connie Mack, etc. are examples. Another example is Conrail, where there was a public need and no private sector interest in providing the financial or operating assets necessary--the risks were simply too high relative to expected returns. Amtrak is currently considered a part of this category. Government exerts control through a combination of limited operational and management controls, (board member, owner of preferential stock, budget review authority, appropriations, etc.) and regulatory controls." *Id.*

[169] "This approach reflects a joint public and private sector investment relationship. The government may share in the ownership of assets and may share in operational responsibilities. Many hub airports facilities and regional transportation authorities (e.g., the Port Authority of New York) fall into this category." *Id.*

reinvention effort is the breadth of the innovative ideas being considered in the efforts to reorganize and consolidate the bureaucracy, such as Franchising, Performance Based Organizations (PBOs) and Employee Stock Ownership Plans (ESOPs). The first two do not involve the termination of federal involvement, except perhaps as an initial step to privatization. The third is a method for privatizing or contracting-out a government commercial service.

It is understandable why unions feel they need to get involved in the reinvention process. Although there are persuasive arguments and studies showing a lack of return or benefits in some instances of privatization; [171] the political realities are that the trend to privatize or reorganize government's functions will not slacken over the next few years. This section will focus on the various options and NPR's effect on the labor relationship. Adding to the volumes written over the years regarding privatization and contracting-out; hearings on the subject were held in March 1995 before the Committee on Government Reform and Oversight.[172] While the unions blamed poor management and arbitrary personnel levels (among other restrictions) as a hindrance to employee productivity eventually leading to wasteful privatization; pro-privatizing speakers criticized minimum manning levels and protection for core governmental functions as barriers to more efficient contracting-out. These arguments will continue to rage because each side has the facts to support its case; but what are the alternatives and how do they involve our labor relations?

-- Contracting-Out under OMB Circular A-76

"Contracting-out" is listed at 5 U.S.C. §7106(a)(2)(B) as one of management's operational rights not subject to negotiation. The NPC has recommended three options to expand bargaining

---

[170] "This is the "outsourcing" or "contracting-out" alternative (FAR recompetitions and OMB Circular A-76 make/buy decisions). It reflects a decision by the government to remain fully responsible for the provision of all services and management decisions. The question is whether the service can be more effectively procured through in-house or contract sources." *Id.*

[171] There are many books and articles discussing the pros and cons of privatization. Two that provided the authors some unique insights are BRENDAN MARTIN, IN THE PUBLIC INTEREST?: PRIVATIZATION AND PUBLIC SECTOR REFORM (1993) and S. ARONOWITZ & W. DIFAZIO, THE JOBLESS FUTURE (1994).

[172] *The Federal Role in Privatization, Hearings Before the Subcommittee on Government Management, Information, and Technology of the Comm. on Government Reform and Oversight,* 104th Cong., 1st Sess. (1995)(ISBN 0-16-047296-2).

over union proposals, two of which affect this right.[173] Under Option 1, Executive Order 12871 would be codified and bargaining would be required on any union proposal unless the agency can show the proposal "substantially interfered" with its remaining managerial rights.[174] Option 2 would add a gradual three-phased implementation of mandatory bargaining over the operational subjects found in §7106(a)(2), such as contracting-out. There would be a "no-fault" period allowing cancellation of agreements for a limited time as the parties experiment with the new rights of bargaining, but in the end the operational subjects would be fully negotiable. Option 3 would immediately expand bargaining rights to include the operational subjects. None of these options was included in its entirety in the 1995 OPM Reform Act.

The courts have held that the federal unions do not have standing to challenge decisions made under Circular A-76 to contract out work that was or could have been performed by the employees represented by the unions.[175] The history of negotiability of union proposals dealing with contracting-out shows the uncertainty in law that can exist in federal relations. Again, we see another instance when the Authority decided its cases contrary to decisions issued by the appellate courts, in this case, specifically the D.C. Circuit and the Fourth Circuit. The disagreements intensified following a remand from the Supreme Court[176] until 1993 when the Authority finally accepted the reasoning of the appellate courts.[177]

The Authority was always concerned with the consequences that contracting-out had on the employees and their inability to address these effects up-front in the decision-making process; it therefore ruled several proposals regarding the contracting-out process to be negotiable. However, 5 U.S.C. §7117(a)(1) excludes bargaining over proposals which are inconsistent with a Government-wide rule or regulation. OMB Circular A-76,[178] which regulates the contracting-out process, is a Government-wide rule or regulation and the circuit courts have limited the negotiability of union proposals on that basis; holding, generally, that Circular A-76 has established procedures for resolving any disputes regarding its implementation and forbids

---

[173] NPC, *supra*, note 29.
[174] The current standard for reviewing "impact and implementation" proposals regarding their interference with management's rights is "directly interferes," not "substantially interferes."
[175] PETER BROIDA, *supra,* note 157, citing *NFFE v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989).
[176] *Dept. of Treasury, IRS v. FLRA*, 110 S.Ct. 1623 (1990).
[177] *AFGE Local 1345 and Dept. of Army, Ft. Carson*, 48 FLRA 168 (1993).
[178] OMB Circular No. A-76, "Performance of Commercial Activities." (Aug 4, 1983), published at Federal Register 37110-37116. (Aug. 16, 1983). OMB documents can be downloaed at http://www.whitehouse.gov/WH/EOP/OMB.

negotiation and arbitration over its processes or decisions.[179] Allowing collective bargaining, which could eventually lead to arbitration, over the implementation of A-76 and its decisions would be inconsistent with OMB Circular A-76. In *AFGE Local 1345 and Dept. of Army, Ft. Carson*, the Authority finally agreed, holding, "We adopt the Court's conclusion that Circular A-76 is a Government-wide regulation and that proposals subjecting disputes over compliance with the Circular to resolution under a negotiated grievance procedure are nonnegotiable. Previous decisions to the contrary will no longer be followed."[180]

It is interesting to consider that even if option 2 or 3 as proposed by the NPC were enacted, the reasoning of the caselaw is that OMB Circular A-76 is a government-wide regulation and proposals which could subject disputes over compliance with the Circular to a negotiated grievance procedure are nonnegotiable because Circular A-76 provides for an exclusive route of appeal. Even though Circular A-76 was recently revised the provisions dealing with the exclusivity of appeals were not changed. Circular A-76 still states:

> "This Circular and its Supplement shall not establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in Part 1, Chapter 2, paragraph I of the Supplement, 'Appeals of Cost Comparison Decisions.'"[181]

Although the appeals procedures have been moved to another section, they still state: "The procedure does not authorize an appeal outside the agency or judicial review, nor does it authorize sequential appeals."[182]

Unfortunately, the NPC proposal to expand the scope of bargaining to include the operational functions, such as contracting-out, would create sufficient uncertainty so as to encourage litigation to delay a proposed contracting-out decision. If the administration wanted to allow negotiation over this subject, it could do this now by revising Circular A-76 to address the

---

[179] *IRS v. FLRA*, 996 F.2d 1246, 1248 (D.C. Cir 1993)("The Circular states that, except for the agency's own internal appeal system, '[t]his Circular and its Supplement shall not ... establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular.' A Supplement to the Circular adds that a decision in the internal review process should not be subject to appeal outside the agency.").

[180] 48 FLRA at p. 206. Still, the Circular does provide an appeal process through the agency, and actions eventually taken to implement the decisions can be negotiable under the "impact and imple-mentation" provisions of §7106(b)(2) and (3).

[181] OMB, Circular No. A-76 (Revised), Part 1, Chapter 1, Section A, para. (7)(c)(8) (Aug 4, 1983).

[182] The appeals procedures are now located at Part 1, Chapter 3, Section K, para. 7.

caselaw. Since that hasn't happened, it is can be reasoned that an expansion of the subjects of bargaining was not meant to change the existing caselaw on this issue. Also, if the unions proposed bargaining over the contracting-out decision, but waived its right to appeal to an arbitrator or outside party, would that proposal be negotiable under the caselaw. After all, it is the communication process which produces the results, even if the union cannot force an agreement. This ability may become more important when the agency has different contracting-out options to consider, and can choose to award the contract without competition, as well be discussed below in the section on ESOPs.[183]

On a related issue, on March 18, 1996, AFGE filed suit[184] to prevent the contracting-out of aircraft maintenance and other functions at three Air Force bases, McClellan AFB, California; Kelly AFB, Texas; and Newark AFB, Ohio.[185] The complaint alleges that the Department of Defense violated federal statutes which (1) require 60% of the "core" maintenance be performed by federal employees[186] and also (2) requires bidding for non-core work to include other depots and DOD facilities, not just private sector contractors. The Department of Defense (DoD) have been advocating greater privatization of the maintenance depots[187] and the Administration, for political reasons of its own, [188] supports the repeal of the statutes inhibiting privatization. Aligned with the AFGE are those legislators who want the workload to flow to the surviving depots in their states.

Recently DoD released a memorandum where Deputy Secretary of Defense John White directed the agencies to make outsourcing and privatization a priority to acheive crucial

---

[183] *Infra*, notes 196-201 and accompanying text.

[184] *American Federation of Government Employees v. Clinton*, DC-S Ohio, Eastern Div, No. C2 96-0283, 3/18/96. Reported in *Privatization: AFGE Suit Alleges That Privatization of Air Force Base Functions is Illegal*, 34 GERR 420 (March 25, 1996).

[185] Kelly AFB was recognized for its partnership initiatives which supposably saved the Federal government over two million dollars in litigation costs. This just show that there are some issues that cannot be agreed to under the umbrella of partnership.

[186] 10 U.S.C. §2464 requires DoD to maintain a core capability sufficient to ensure technical competence and resources necessary for an effective and timely response to a mobilization or other national defense emergency. This requires sufficient depot maintenance to support the JCS contingency scenarios. However, 10 U.S.C. §2464 also allows DoD to contract out core logistical functions under Circular A-76. Still, under 10 U.S.C.§ 2466, no more than 40% of DoD's maintenance and repair work can go to private firms.

[187] DoD released a report on April 4, 1996, urging elimination of the 60/40 split. *DOD Asks Congress To Eliminate Split In Depot Level Maintenance*, 34 GOVERNMENT EMPLOYEE RELATIONS REPORT 513 (April 8, 1996).

[188] The Adminsitration has an vested interest in this matter because, in a political move, it promised to privatize the maintenance work at McClellan AFB and Kelly AFB so as to retain the employment in the local community. Without the correcting legislation, it may be impossible to fulfill the promise and close the bases.

savings.[189] Secretary White explained that DoD must increase procurement funding in the future to maintain it technological superiority, but the current fiscal climate is such that DoD cannot expect any increased funding. The solution is found by savings created through procurement reform, base closures, and outsourcing and privatization where competition can show savings.

This is not a labor management problem, it is a political issue. According to DoD between 13 and 15 billion dollars is spent annually on depot maintenance, which provides employment for 89,000 federal employees at 30 depots and also 1,300 private firms. As Secretary White explained these "budget" issues directly impact mission priorities, and it is not unrealistic to see the link between "technological superiority" and "competitive outsourcing and privatizing". Should issues such as this really be determined by local area bargaining?

This matter will eventually depend on the lobbying power of the unions, their power of access, and the ability of the unions to negotiate in the political arena. If the statutes and law are on their side, then their negotiating position improves. On March 28, 1996, the Administration announced a grant of 14.5 million dollars to assist 6,000 maintenance workers at Kelly AFB who will lose their job,[190] and a bill has been introduced in Congress to allow the employees taking jobs with the private contractor to also take their retirement plans. The AFGE expressed approval of the job training grant, but also said it will not affect their suit to stop the drive towards privatization. Although this matter involves fundamental labor-management employment issues, and the basic issues might be subject to negotiation under a expanded scope of bargaining, such as proposed by the NPC, it is obvious these issues go beyond labor-management bargaining at a local level, and the solution is a political one which will be resolved without involving the Federal Service Labor-Management Relations Statute.

---

[189] The memorandum entitled, *Improving the Combat Edge Through Outsourcing*, was reported as one of three reports issued on 4 April 1996. BNA, *DOD Directs Military Services to Pursue Outsourcing, Privatization Opportunities*, 34 GERR 543 (Apr. 15, 1996).

[190] *Administration Awards $14.5 Million For Displaced Workers At Kelly Air Base*, 34 GOVERNMENT EMPLOYEE RELATIONS REPORT 513 (April 8, 1996). This also helps the Administration as it preaches "corporate citizenship".

-- Revised Supplemental Handbook to OMB Circular A-76

As part of "reinvention", the Supplemental Handbook to Circular A-76 was revised on 1 April, 1996 to make it more user friendly for the agencies.[191] Among several changes, the revised Handbook to Circular A-76 modifies or eliminates some cost comparison requirements, provides for enhanced employee participation; eases the transition requirements to facilitate employee placement, and expands the scope of appeals available to affected parties. It also seeks to improve accountability and oversight to ensure that the most cost effective decision is implemented. The flexibility provided to the agencies can inhibit or encourage contracting-out depending on the predilection of the agency.

Regarding the philosophy behind Circular A-76 and the Revision, OMB said, "Industry and trade group commentators, generally, sought a 'reinvigorated' policy statement of strict reliance on the private sector. In their view, the Revision should require or, at a minimum, permit the direct conversion of all commercial activities to contract performance, without cost comparison. Objections were made to the proposal to permit agencies to continue their existing interservice support agreements for commercial activities, without cost comparison. OMB is not, at this time, considering changes to the Circular A-76 itself. The Circular requires reliance on the private sector when shown to be economically justified. It does not require the conversion of in-house work to contract, as a matter of policy, unless a cost comparison, conducted in accordance with its Supplement, demonstrates it to be in the best interests of the taxpayer." [192]

Some of the more interesting revisions are:

- expands the list of functions exempted from cost comparison and gives the agencies greater leeway to determine core activities;[193]

---

[191] Revised Supplemental Handbook, Performance of Commercial Activities, OMB Circular No. A-76, 61 FR 14338, (April 1, 1996). The provisions of the Revised Supplemental Handbook are effective March 27, 1996 and apply to all cost comparisons in progress that have not yet undergone bid opening or where the in-house bid has not yet otherwise been revealed.

[192] 61 FR at p. 16340.

[193] The draft Revision had proposed a cap on the agency's determination of "core activities" to 10 percent of the agency's total FTEs. Core activities are excluded from A-76 requirements because they represent an essential commercial service. The final Revision removed the proposed 10 per cent limitation to provide maximum flexibility to the agencies to identify functions as "core" and exempt them from cost comparison. In place of the 10 percent core limit, one commenter had requested the right to appeal agency determinations of their core requirements and their decision to convert from in-house to contract performance on the basis of a core designation. This change was not

- encourages agencies to consult with the employees and involve them at the earliest possible stages of the competition process, subject to the restrictions of the procurement process and conflict of interest statutes;
- authorizes conversion of functions involving 11 or more FTE to contract performance, without cost comparison, if fair and reasonable prices can be obtained from qualified commercial sources and all directly affected Federal employees serving on permanent appointments are reassigned to other comparable Federal positions for which they are qualified;[194]
- expands the appeal process to permit appeals not only of costing questions, as permitted under the 1983 Supplemental Handbook., but also general compliance issues, such as appeals based on factual information contained in agency waiver justifications, information denials, and instances of clear A-76 policy violations.[195]

The revisions have been in existence for less than a month at the time this article is being written, and it remains to be seen how the changes will affect labor management relations. It is obvious OMB tried to accommodate the interests of the employee and unions while also giving the agencies expanded flexibility. The unions must still process the appeals through the agency, and although still denied the right to negotiate or arbitrate its disputes through the grievance process, the expanded appeal rights are still a significant empowerment for the unions.

---

incorporated. OMB has decided that the determination of a "core" function is, fundamentally, a management decision.

[194] "There was strong support and strong opposition to this provision. One commenter suggested that no conversions should be authorized without a cost comparison -- even if all Federal employees are placed in other comparable Federal positions. ... In contrast, another commenter objected to the idea that failure to place a single employee could require a cost comparison or otherwise delay a direct conversion to contract. The provision has been modified to clarify that in addition to assuring placement in "comparable Federal positions," the conversion to contract with placement and without cost comparison is limited to competitive awards. These direct conversions to contract must retain the benefits of full and open competition. In the absence of adverse actions to Federal employees and similar to the policy of reliance on the private sector for new starts and expansions, Federal managers should be permitted to rely on the competitive dynamics of the private sector." Announcement of Revised Supplemental Handbook, *supra*, note 177.

[195] OMB did not permit appeals of basic organizational decisions, saying, the A-76 appeal process is not a surrogate to resolve management-union complaints.

-- ESOPs

Another interesting development in this area is the possibly of shifting governmental functions over to an Employee Stock Ownership Plan (ESOP). In April 1996, OPM announced the first ESOP privatization initiative to be tried by the federal government, which will occur when OPM's Office of Investigative Services (OIS) is closed in July 1996.[196] The functions of OIS will be contracted to a new company called U.S. Investigative Services, Inc., an ESOP. When the ESOP service contract is awarded, the current employees of OIS would be performing their same jobs--but as employees of a private contractor, not as federal employees.

An ESOP is a voluntary association of the employees who band together to control the corporation for which they work. They obtain a loan to purchase a controlling interest of the stock of the corporation, which will be held in trust for the employees. Additional purchases can be made until the corporation is 100% employee-owned. In the case of OPM/OIS, the employees will be offered jobs by the ESOP in May or June 1996.[197] The employees who accept employment with the ESOP will maintain their same salary, switch to a 401(k)-type savings plan, and receive stock in the company. Eventually 100% of the company will be owned by the employees. There will be incentives for the employees to immediately join the ESOP and its is expected that 90 to 95% of OIS employees will switch. The contract was awarded without competition and government offices, furniture, computers, and vehicles will be furnished to the ESOP as part of the contract; otherwise, it appears the ESOP was privately financed.

The ESOP's CEO said, "the government would save money because it would avoid future pension payments to workers. The company steadily will lower the price of its work to the government by reducing the number of vacation and sick days granted employees, by using a smaller management team and by acquiring new business from state and local governments."[198] Roger Neece, President of ESOP Advisors, Inc. and an investment banker familiar with ESOPs, conducted feasibility studies for OPM/OIS, as well as the Army Management Engineering

[196] The first notice of the ESOP conversion was printed in The Washington Post on April 14, 1996. Announcement of the actual contract award was scheduled for April 15, 1996. STEPHEN BARR, *OPM, in a First, Acts to Convert an Operation Into Private Firm*, THE WASH. POST, p. A-4 (April 14, 1996).

[197] The following information was obtained from the newspaper article cited in footnote 34 above.

[198] STEPHEN BARR, *supra*, note 196.

College, the Air Force Guidance and Meteorology Center, and other DoD operations.[199] Neece says employee-owned businesses tend to have higher revenues, less absenteeism, and less turnover than other private companies because of the economic incentives and psychological differences associated with employee ownership.

In 1995, OMB provided guidance and information regarding the conversion of governmental functions to ESOPs saying,

> The information should be useful to employees whose work is being considered for conversion to private sector performance and to those interested in submitting offers to perform such work. It should be particularly helpful to federal employees involved in DOD Base Closures, service termination decisions, OMB Circular A-76 cost comparisons or other privatization initiatives, permitted or required by law.
> ...
>
> The Federal Employee Conversion to Ownership Plan (FED CO-OP) incorporates ESOP concepts to facilitate the transition of Federal employees to private sector performance, provide limited employment guarantees, pension portability, stock ownership, opportunities to share profits, and other incentives that may serve to mitigate the potential adverse employee impacts of an agency's conversion decision.[200]

OMB provides several possible incentives to encourage ESOP conversions, such as:

- The government, may award a service contract to any firm bidding with ESOPs, or include ESOP criteria in its overall evaluation and selection of best offers.
- In return for a commitment to set up an ESOP, an agency could simply transfer the existing employees who want to participate, personal property and equipment to the new (ESOP) service contractor.
- Equipment transfers could be made at no cost, minimal cost, on a leveraged buy-out basis or transferred at book value. Real property assets could be retained by the Government and made available to the ESOP on a case-by-case basis.
- The service contract could be structured to require offerors to provide a stated percentage of the initial capitalization to fund the ESOP.

---

[199] KATHERINE M. PETERS, *The Hard Sell*, GOVERNMENT EXECUTIVE 20, 24 (Feb. 1996).
[200] NPR and OMB, PRIVATIZATION RESOURCE GUIDE AND STATUS REPORT, (Feb. 13, 1995).

The current expectation is that after the initial contract period the function or service being performed will be opened for competitive bid and it is hoped the ESOP will be sufficiently diversified and financially viable to branch into the private sector, if necessary. It is unknown how these arrangements will impact future labor-management relations, but certainly given a choice between contracting-out as has occurred in the past and contracting-out to a ESOP, it appears the employees and the unions would want to bargain for the latter. As discussed above in Contracting-out, the unions have limited ability to negotiate the contracting-out decisions.[201] Here is one area the union may desire to bargain with the agency over the possible options. It appears that ESOPs will receive favorable treatment in many ways and will be assured an initial contract. Once the caselaw prohibitions are addressed, proposals requiring that the agency award the contract to an ESOP may be negotiable if the managerial right of contracting-out becomes a mandatory subject of bargaining. This could be an amazing opportunity for the unions, if the function is going to be contracted out in any event and the union foresees itself becoming the exclusive representative in the eventual ESOP. It could also be a tar patch of litigation for all of the parties concerned.

One issue that may be of interest in the future is the duty of the union regarding ESOP privatization, when they are not assured of continued representational status. That issue will probably have to be addressed at some later date.

-- Federal Entrepreneurial Organizations

The administration is also experimenting with various entrepreneurial organizations, which will remain federal entities but operate under unique personnel and acquisition rules.[202] Several examples abound, such as:

- the FAA legislation (HR 2276/S1239) which overhauls the personnel and procurement rules of the FAA, as it makes it an independent agency;
- the conversion of the Patent and Trademark Office to a government corporation (S1458), giving the Commissioner sole and exclusive discretion over the system for

[201] *Supra*, notes 173-183 and accompanying text.

[202] A recent article suggesting reform of federal corporations in light of expected increased use under NPR Phase 2 is, A. MICHAEL FROOMKIN, *Reinventing The Government Corporation*, 1995 U.ILL.L.REV. 543 (1995).

job qualifications and procedures, as well as for compensation based on performance, but also allowing bargaining over the issues;

- Performance Based Organizations, which are federal organizations using existing administrative flexibilities and the demonstration project authority in 5 U.S.C. Chapter 47, allowing changes to its personnel and compensation systems. On April 1, 1996, OPM released a template for PBOs.[203]

All of these organizations have some common characteristics. They hold the manager accountable; they encourage employee participation and partnership with the unions; and they relax the rules on personnel systems and methods of compensation with an emphasis on providing flexibilities and incentives. The new organizations will bargain over subjects not previously considered in the federal sector. Along with the reinvention laboratories, these entrepreneurial organizations are prototypes and experiments, perhaps eventually transferring their successful practices government-wide. One concern will be NPR's announcement of success before a true test has been made, and its embrace of successes which cannot be transferred government-wide. Still, these innovations will continue to be in the news and presented as models for future organizations and changes in the federal government, and at a minimum will provide case-studies for further federal innovations.

THE REINVENTION PROCESS IS NOT THE APPROPRIATE VEHICLE FOR REFORMING FEDERAL LABOR RELATIONS

The thesis of this paper is that the reinvention process, as proposed by NPC and the 1995 HRM Reinvention Act, does not provide an appropriate vehicle for reforming our federal labor management relationship, and there are a number of reasons for this.

First, their basis, the NPR, has a number of problems. The NPR has no fundamental concept holding it together and instead builds on short-term successes. It does not provide a deliberative reform process, especially when it comes to labor relations. NPR has also been criticized on other grounds, such as its default in addressing the tension between necessary control and

[203] *OPM Issues Template To Help Agencies Convert To Performance-Based Systems*, 34 GERR 513 (April 8, 1996).

employee empowerment, its questionable sustainability, and its failure to involve Congress or the middle managers and obtain their commitment. NPR's focus on customer service, employee empowerment, and downsizing; results in labor relations being the afterthought. This is not the way we should reform our federal labor relations.

Second, NPR detracts the parties from perceiving labor reform as an evolutionary process, to be taken in steps after an exchange of ideas and viewpoints. It should be built with an eye to lasting reform and it should instill certainty that can last through administrations. So long as there are positive changes occurring under NPR, it is easy to dismiss the faults; but by setting the agenda, NPR prevents reform that would naturally evolve but which doesn't pass the NPR test. In addition, if NPR should fail or be overcome by the next administration's initiatives, its associated reform could be jettisoned. Labor relations should not amended based on the latest fad in public administration.

Third, other mechanisms exist to encourage positive changes in the federal bureaucracy. The Chief Financial Officers Act (CFOA) and Government Performance and Results Act (GPRA) are significant legislative tools which can be used to steer the bureaucracy. Any labor reform should be integrated into the development of these two acts.

This analysis could be better defined or constructed or the thrust of the arguments might be crafted differently by others, but in the end it has to be agreed that our Federal Labor Management Relation Statute involves questions of fundamental power at the political level; and at the local level, it determines the balance of power at the workplace. Changes to the Statute should not rest on changing definitions, such as customer satisfaction, which may not be a legitimate goal of the government in all cases anyway. NPR simply should not be the vehicle used to reform our federal labor relations.

Basic Problems with NPR

Four critical problems with NPR were identified by Donald Kettl in his contribution to *Inside the Reinvention Machine.*[204] He identifies the four problems as: built-in tensions or conflicts, a

[204] D. KETTL, *Building Lasting Reform: Enduring Questions, Missing Answers* in INSIDE THE REINVENTION MACHINE, p. 83 (Eds. DiIulio and Kettl) (1995).

potential lack of capacity or resources to do the job, the absence of a central idea or philosophy, and the failure to identify the glue that will hold the empowered bureaucracy together, but he believes each of these problems can be overcome.

Other public administration scholars have raised more basic criticisms of NPR. The increasing use of best management practices to reform public agencies, such as NPR's reinvention process, has led to a classification in management development known as "Best Practice Research" (BPR). A simple definition for BPR would be that a management researcher studies the practices of several successful organizations to find the common thread in their success. The common thread becomes a principle of success and is then applied to all organizations seeking similar success.

Two scholars, Overman and Boyd, have criticized BPR for creating the delusion of learning from experience. "Actually, BPR has a bias toward very short term experiences only and does not look at the longer term and unintended consequences of reform efforts identified as best practices."[205] An example of this practice is NPR's belief that employee empowerment and customer service are essential principles which must be embraced by every federal organization. Likewise every organization must establish engage in partnership with its union. This ignores several consequences which may be peculiar to some federal organizations. First, in some government organizations, identifying the customer or determining the priority that a customer will receive may be a political decision that should be made from the top-down, not the bottom-up. The mission or direction of the organization cannot be determined through employee empowerment and customer service. Second, not every union leader is receptive to partnership and cooperation. Removing the tactical advantage associated with permissive bargaining could hinder a peculiar manager's ability to achieve results in the organization. That flexibility would be lost because NPR found a common thread in "partnership".

Also, NPR reform works many places because there is trust between management and the unions. Partnership and bargaining over permissive subjects when both sides have common interests does not draw out the antagonism that may occur with a change in administrations. That is why focusing on the short-term success stories of partnership at Red River Depot or Kelly

[205] E. SAM OVERMAN AND KATHY J. BOYD, *Best Practice Research and Postbureaucractic Reform*, JOUR. PUB. ADMIN. RESEARCH AND THEORY 67, 77 (Jan 1994).

AFB may not be productive in the long run. If current efforts continue, the unions will become more enmeshed in the decision-making process of the federal agencies, having more and more impact on the budget and organizational priorities. The short term objective may have been political, as suggested by Donald Kettl;[206] or a practical understanding by the parties of the evitable, but the long term consequence may be more litigation and less efficiency with the next administration.[207] In fact, the lawsuit by AFGE regarding the privatization at Kelly AFB shows partnership will not resolve all of the problems, and it may only take one contentious problem to destroy the trust and common interest needed for partnership.

Another delusion of BPR identified by Overman and Boyd is that it supposedly treats all managers similarly, but actually BPR reacts to only a select group of managers. This causes two problems, one, competent managers are banished because they do not embrace the latest management theory, and two, it distorts the research. Those who embrace the new management theory and advocate innovative practices receive more money, training, and attention, and the organizational success is as much a consequence of this increased attention as the change in management practices. This is seen in the establishment of pilot programs, which receive attention, training, and resources which are not otherwise available to other organizations.

BPR is also criticized for its propensity to avoid probing and critical analysis of its case studies and avoiding scientific validation of its successes. Demonstration of this fault is found in recent articles covering past BPR territory. In *Entrepreneurial Government*, Rob Gurwitt[208] reported on the disestablishment of entrepreneurial government in Vitalia, California, which, while under the management of Gaebler, had been labeled "the most entrepreneurial city in America". The empowerment of the city's employees and their ability to try innovative ideas led to an unintended investment of 20 million dollars by the city in a hotel project, and subsequently to a shift in the political winds and the election of a conservative city council that demanded

---

[206] KETTL, *supra*, note 204 at p. 24. "The NPR avoided a quick counterattack by the unions and in fact won their endorsement for the report."

[207] Even the unions understand that the next Administration may be hostile to the objectives of the public employee unions. NTEU filed a suit (NTEU v. U.S., DC DC, No. 96-624, filed Apr. 9, 1996) challenging the constitutionality of the line-item veto because the line-item veto would make it more difficult to push through legislation improving wages, benefits, and working conditions if a president is hostile to these issues. BNA, *NTEU Suit Challenges Constitutionality of Recently Signed Line-Item Veto Bill*, 34 GERR 544 (Apr. 15, 1996)(Reporting remarks of Robert Tobias, National Prersident of NTEU).

[208] ROB GURWITT, *Entrepreneurial Government: The Morning After*, GOVERNING 34 (May 1994).

tighter control over the city's budget. Gurwitt also wrote of shifting political fortunes in Minnesota, where the state's STEP program, an award winning program which seeded management-reform projects throughout the state, was discontinued, without a word of dissent, by the new Republican administration because it was distracting government from its responsibilities.[209] The demise of the entrepreneurial programs in Minnesota was also noted by Paul Light, who said:

> "Of the 35 Minnesota programs lauded in *Reinventing Government*, 8 are now dead, including two that barely got off the ground in the first place. Another two are no longer fully in the public sector, spun-off into the non-profit, quasi-government world. Another three are so close to death, so imperiled by political circumstance and controversy, that it may be time to put in a call to Dr.Jack Kevorkian. ... Statewide, then, Minnesota's reinvention projects have a survival rate of about three in five. That's not bad - private sector innovation efforts go belly up roughly half the time - but it may be intolerable all the same."[210]

Politics also figured prominently in an article by Barton Wechsler which examined Florida's civil service reform, which like NPR, was based on the BPR of Osborne and Gaebler's *Reinventing Government*.[211] Weschler concludes Florida's reform effort foundered on a misunderstanding of the problems and the proper remedies, and the failure to reconcile basic philosophical differences between the executive branch, the agencies, and the legislature.

Each of these articles provided insights into reform efforts based on the BPR of Osborne and Gaebler which deserve repeating because they are relevant to the NPR reinvention initiative. Regarding legislative cooperative, Wechsler says, "The Legislature, not surprisingly, was not eager to give up budget authority or to cede large amounts of management discretion and control to agencies."[212] The NPR challenges the Congress to stop its micromanagement of the bureaucracy in the interests of efficiency, but the contentious government we established in the last election is not likely to trust the executive branch to proceed on its own, if for no other reason than the political consequences flowing from the reinvention process.

---

[209] This sounds remarkably similar to an observation in Gurwitt's article, where a city official says, "'There were meetings and meetings and meetings.' ... There were team-building meetings, training sessions, personality profiling exercises, and lots of brainstorming sessions." Gurwitt, *supra*, note 208 at p. 40.

[210] PAUL LIGHT, *Surviving Reinvention*, GOVERNMENT EXEC. 55 (Jun 1994).

[211] BARTON WECHSLER, *Reinventing Florida's Civil Service System: The Failure of Reform*, REV. PUB. PER. ADMIN. 64 (Spring 1994).

[212] *Id.* at p. 75.

Light focuses on the possibility that political appointees would introduce real reform, especially considering the high turnover rates at the top of the federal hierarchy. He believes political appointees have short-term agendas because they enter their jobs expecting to leave once they build their resume. Light sees our reliance on political appointees to manage bureaucratic reform to be counterproductive. This view is shared by James Sundquist, who sees the establishment of chief operating officers (COO) at each agency as potentially one of the most important and constructive recommendations of the NPR, but for the fact that the COO is a political appointee.[213] He says the COO should be a career executive who can bring competence and continuity to the position. Each had a different, but similar, perspective of the political control of the bureaucracy, which is strengthened by NPR. There is also another practical consideration, that has not been raised. Certainly, strengthening the political control of the executive branch over the bureaucracy is nothing new, even under a divided government such as we have now. But this Administration is also attempting to include the unions in the decision-making process of the agencies, even if their achievements are not yet substantial. A question that should be considered is, what will happen when the political appointees from a future administration have an agenda which is contrary to the interests of the unions? The NPR proposals set the stage for this confrontation, by enmeshing the unions in the bureaucracy and strengthening the political control over the bureaucracy. This is a potent mixture for future administrations.

Somewhat related to these issues is a quote included in Gurwitt's article, "The purpose of government is to serve the needs of the community and to provide a forum for resolving community disputes as well as providing the public services that the community needs, and those aren't the primary purposes of entrepreneurial activity as it's generally understood in our society."[214] The same sentiment is eloquently repeated by James Carroll, "The primary purpose of the federal government stated in the Preamble to the Constitution is not to provide services. The primary purpose is to establish and maintain a legal and institutional framework for reconciling differences among individuals and groups in the pursuit of national values and

[213] JAMES L. SUNDQUIST, *The Concept of Governmental Management: Or, What's Missing in the Gore Report*, PUB. ADMIN. REV., p. 398 (Jul/Aug 1995).
[214] GURWITT, *supra*, note 208 at p. 38, quoting Gordon Whitaker, a professor of public adminsitration at the University of North Carolina.

objectives, such as a more perfect union, the common defense, justice, domestic tranquillity, liberty, and the general welfare."[215]

The two themes examined above, the need for technical competence in the management of the government; and, the purpose of government is politics, to reconcile differences of the interest groups, are each accurate. Managerial competence should be a prerequisite for the appointment of the senior manager or administrator of any agency, not political affiliation or connections. At the same time, it is politics, not professional competence, that turns the gears of government and steers its course. Labor relations is also determined by politics, as a reconciliation of competing interest groups. It was not constructed to necessarily deliver the most efficient workforce, but to resolve legitimate competing interests. It should not be amended to support management theories based on "threads" found in short-lived successes or to achieve professional competence at the expense of democratic control. Labor relations addresses central core issues of governance which require political consensus, such as budgets, organizational priorities, as well as equity, fairness, and due process. If it is inefficient in some respects, it is because these values and rights must protected, even if it requires a cost in efficiency.

To conclude this section, it would be useful to return to an observation of Donald Kettl, who said, "[t]he NPR largely ignored fundamental differences between public and private management as well as centuries-old thinking about how to hold bureaucratic power democratically accountable. In particular, the NPR dealt poorly with both the political and the constitutional roles of Congress in American bureaucracy. Finally, the critics struck a telling blow in pointing to the fundamental political causes at the root of many administrative problems."[216] Kettl then counters the same critics by essentially saying the reinventers would have little need to introduce reform if the old theories continued to work and the pragmatic approach of the reinventers has simply outpaced the theory in the field of public management. These are the two views. For the author, there simply isn't sufficient principle or accountability in NPR to use it as a basis for building lasting reform in federal labor relations.

---

[215] JAMES D. CARROLL, *The Rhetoric of Reform and Political Reality in the National Performance Review*, PUB. ADMIN. REV., p. 302-312 (May/Jun 1995).
[216] KETTL, *supra*, note 206 at p. 49.

The Reinvention Reform Fails to Focus on Real Issues Needing Reform Which Might Otherwise Occur

Evolutionary change in federal labor relations is stifled by channeling reform through the reinvention process. Federal labor relations is flexible enough to incorporate changes to encourage employee empowerment and partnership, without requiring the blessing of "reinvention". The federal agencies were already studying the private sector's experience with employee participation and several agencies had proceeded down the quality path prior to NPR. Like the commander of the Red River Depot in 1992, managers were considering different methods of management and considering, or engaged in, partnership with the union, although they may not have realized it.

But the real problem that needs to be addressed when we discuss the scope of bargaining is not whether the subjects listed in §7106(b)(1) or §7106(a)(2) should be mandatory subjects of bargaining, but whether the entire section needs to be rethought. The focus should not be on §7106, but on management's right to determine its budget and set its organizational priorities. The difficulty in finding the appropriate line will become more difficult as agencies experiment with performance standards, incentives, and alternate classification schedules. Considering the current status of the law, what is needed is more certainty for the agencies and unions. Certainty in responsibilities and obligations will result in less litigation, and is as essential to a productive federal bureaucracy as partnership.

Following a separate course of reform would allow consideration of alternatives not directly associated with NPR. What are "appropriate levels of bargaining" can receive diversified attention following a different route of reform. For example, there is no provision explicitly for multi-union bargaining over common issues, although NPR might consider agency level partnership councils as a substitute. As personnel issues are pushed down to the agencies, the question will be whether agency-wide regulations will be greater deference or the agencies can reach an agreement with different unions on an agency-wide level. The 1995 OPM Reform Act proposed to legislate multi-union bargaining by allowing the agency-level partnership council to reach agreements which would bind all subordinate units. The problem with this approach is that it introduces another level of bureaucracy in the federal government, a political level. Of

more concern is the removal of negotiations from the employees to an agency bargaining unit created as a political concession. It is the beginning of a union-management bureaucracy that will eventually result in employee alienation as decisions affecting their working conditions are made between the unions and the agencies at levels beyond their reach. NPR limits the ability to consider other approaches or consider the practical advantages of allowing the agency to implement its proposals after consultation with the employees.

At the other extreme in a consideration of the "appropriation level of bargaining" is the potential for unions to empower their individual members to bargain over conditions at their individual worksites. Like the NLRA, the Statute recognizes exclusive representation for appropriate bargaining units and prohibits the by-pass of the unions in dealing with employees.[217] However, the federal agencies are burdened with one other handicap. the requirement to give the union an opportunity to be present at formal discussions between the agency and any employee. This rule was created in Executive Order 11491, Section 10(e)[218] and was incorporated into the Statute at §7114(a)(2)(A). Understandably, NPR reform would never consider deleting this section but it should receive reconsideration under a true reform effort.

Since its inception, the definition of "formal discussion" has been expanded so that the rule now goes far beyond a union shield to prevent "bypass" of the unions, and it has become a snare for the supervisor who fails to know its wide ranging application.[219] It applies to quality circles[220] and similar organized meetings which involve any discussion of the conditions of employment. In a Memorandum addressed to the Regional Directors, the General Counsel (GC) of the Authority explained his views on the rights of agencies and unions in establishing and

---

[217] 5 U.S.C. §7111(a) and §7116(a)(5) (1995).

[218] Executive Order 11491, Section 10(e) provided: "When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

[219] In *Dept. of Veterans Affairs v. FLRA*, 3 F.3d 1386 (10th Cir. 1993), it was held interviews of employees conducted by an agency's staff attorney in preparation for a hearing constituted formal discussions in connection with a grievance so that agency committed unfair labor practice in failing to give union advance notice and opportunity to be represented, even if *Brooks/Johnny Poultry* rights are given. In a special concurrence Judge Moore said, it is an illogical result, but because the law required this absurdity, he must concur, although he does not like doing so.

[220] *Defense Logistics Agency, Defense Depot, Tracy, California And Laborers' International Union Of North America, Local 1276, AFL-CIO* , FLRA ALJ Dec. Rep. No. 25, 1982 WL 23451 (Dec. 28, 1982).

implementing employee participation plans (EPP), such as quality circles.[221] One practical observation was that when the union and the agency are working cooperatively and collaboratively under partnership principles there are usually no disputes, because "the parties are intent on obtaining the best solutions and not focusing on rights and obligations under the Statute."[222]

While the rules in this area are clear, the difficulty is in the practice. Consider a supervisor enthused with employee empowerment who holds frequent meetings with his employees to discuss working conditions and include his employees in all the decisions, but doesn't understand his duty to invite the union to the meetings. The easy answer is that the agency needs to educate the supervisor, but maybe it really raises a more fundamental question. If union and management agreed to a implementing a quality program, why can't the supervisor deal directly with his employees to discuss working conditions which are peculiar to them, without inviting the union representative? This would be employee empowerment by the unions. If the union did not agree to the quality program then the supervisor's practice can be prohibited as an ULP for by-passing the union. While the parties can negotiate over the application of the "formal discussion" requirements as they implement the quality program, that doesn't address the fundamental question, why is it still needed in the era of employee empowerment. The "formal discussion" rule remains to ensnare unwary managers, and counsel, and remains an additional obstacle between the employee and management. It is highly unlikely under NPR that the formal discussion rule will ever be reconsidered, even if it is contrary to the theme of employee empowerment. Practically speaking, if the parties are engaged in partnership, it is unlikely the union would ever raise the issue, but one real indication that the Statute is truly being reformed is that §7114(a)(2)(A) is actually reconsidered, otherwise the "reform" is really only a shift in negotiating power.

---

[221] Memorandum to FLRA Regional Directors (Aug. 8, 1995). The memorandum is available by faxing a request to the Office of the General Counsel at 202-482-6608. The views of the GC are: An agency commits an unfair labor practice if it deals directly with unit employees over negotiable terms and conditions of employment. *Air Force Accounting and Finance Center, Lowry AFB, Denver Colorado*, 42 FLRA No. 85, 42 FLRA 1226 (1991). Therefore if a supervisor-employee group is going to discuss issues appropriate for negotiation with the exclusive representative, the group cannot be established without the consent of the union. *Department Of The Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii*, 29 FLRA No. 96, 29 F.L.R.A. 1236 (1987). The union is under no obligation to negotiate the agency's proposal to establish an labor-management group that will discuss negotiable conditions of employment.

[222] Memorandum, *supra*, note 221 at p. 2.

Again, so long as there were positive changes occurring under NPR, it is easy to dismiss the faults of NPR. The one effect that is overlooked is that this deference to NPR, allows NPR to set the agenda and hinder reform that might naturally evolve except that it doesn't pass the NPR test or is not within the field of focus of the NPR eyeglass.

Labor Relations Reform Should be Integrated with the CFOA and GRPA

A third reason to avoid using NPR as the guide in reforming federal labor management relations is the recognition that Congress has decided to manage the bureaucracy through recent legislation, specifically the Chief Financial Officers Act (CFOA), as amended by the Government Management Reform Act of 1994 (GMRA), and Government Performance and Results Act (GPRA). Any reform of labor relations should be integrated with these acts as they are developed and used to steer the government. This is not necessarily contrary to the NPR, but the emphasis under the two is different.

The NPR called for annual financial reports of the federal government and a focus on results. While the CFOA and GPRA support and implement many of the recommendations of the NPR, the determination whether a particular proposal should be enacted should not depend on its relationship to the NPR report or its HRM or management-labor relation recommendations, but rather on the unifying, long-term vision for managing the federal government that will occur through the CFOA and GPRA. The prescription underlying the NPR, that the government must focus on performance and accountability is already structured within the legislative framework of the CFOA and GPRA. If labor relations reform is not needed to further the goals of these acts, then it should not be enacted simply because it is recommended by NPR, NPC, or contained in the OPM proposed legislation. The CFOA and GPRA were not products of the NPR, they were legislative attempts to obtain control over the federal government and they obstentibly strengthens Congressional oversight, potentially interfering with NPR's broad theme of bottom-up management and strengthening the executive branch.

The CFOA and GPRA impose accountability on the agencies and require them to account for their financial management and the performance of their agencies. It is top-down management.

The CFOA, as amended, requires the 24 major executive agencies[223] to produce an entity-wide annual financial statements by 1 March 1997.[224] By March 31, 1998, the executive branch will submit a consolidated financial audit which will be audited by the Comptroller General.[225] It may sound surprising but before passage of the CFOA there was no requirement for an agency-wide standardized audit.

While the CFOA concerns financial management, the GPRA manages agency performance and results. The GPRA requires the agencies to submit strategic plans to OMB and to Congress by September 30, 1997. In the strategic plan, an agency will state its mission and objectives and explain how it intends to achieve these objectives with a description of the operational processes, skills and technology, and the human, capital, information, and other resources the agency will need to meet its objectives. Beginning the next year, the agency will also submit an annual performance plan, setting out specific performance goals for the agency. OMB will consolidate the performance goals and analyze the government-wide performance plan in conjunction with the President's budget to determine its feasibility. This report will be sent to Congress beginning in February 1998. Beginning in FY 1999, the agencies must compare their actual performance with the goals that they set in their plans.

The GPRA also included a provision for pilot programs. In these programs the managers are allowed greater flexibility through the waiver of regulatory constraints in return for accountability for the performance of their programs and operations. Although the law required only 10 pilot programs, over one hundred program sites have been identified. The NPR highlighted these pilot programs as one of the cornerstones of new accountability in federal government.[226] A survey was conducted by the Washington Public Affairs Center of U.S.C. to assess some early results from the programs and found the greatest difficulty for the participants was selecting performance indicators.[227] Another frequent observation was the reluctant of

---

[223] The official literature covering the CFOA often refers to 23 executive agencies. The Social Security Administration was added as the 24th agency by the Social Security Independence and Program Improvement Act of 1994, Pub. L. 103-296 §108(j)(1), Aug, 15, 1994. In 1994 the 24 executive agencies accounted for $1,566,150,000 in budget outlays and 98.8% of the federal budget.

[224] 31 U.S.C. §3515(a), Pub. L. 103-356, Title IV, §405(a).

[225] 31 U.S.C. §331, Pub.L. 103-356, Title IV, §405(b).

[226] NATIONAL PERFORMANCE REVIEW, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: STATUS REPORT, p. 41 (1994).

[227] VICTOR J. KIMM, *GPRA: Early Implementation*, THE PUBLIC MANAGER, p. 11-12 (Spring 1995).

program managers to move towards outcome-oriented performance measures because these factors were thought to exceed their direct control or because they would limit program flexibility. The survey was a sounding board for respondents engaged in the pilot program, and one point come out loud and clear, the respondents wanted more information, training, and guidance on performance measures and how to link them to the strategic plan and the budget. This hearkens back to the GAO study of the reinvention laboratories[228] which had the ability to seek waivers of workplace regulations but did so in only forty percent of the cases and then less than one-third of the waiver requests involved personnel rules. If the program managers are still dealing with the basics of performance measurements and process improvements, why is it necessary to force a change in their human resource management relationships during this transition, unless they want it to happen?

Together the CFOA and GPRA are intended to prod the bureaucracy to tie the budget to performance and become accountable for the results. As the managers learn the new programs and develop indicators for performance, they will demand innovations in human resource management, but it is not the managers who are demanding changes in labor relations. For now the focus should be on implementing the CFOA and GPRA. This is still consistent with NPR. A focus on outcomes led the Coast Guard and OSHA to totally refocus their attitude and operations with impressive results in safety statistics. There is a great deal of training and a dramatic change in the work culture that still needs to take place to successfully implement the CFOA and GPRA in the federal government. Any reform of the labor relationship in the federal government should be related to these acts which are meant to provide long range strategic plans tied to the agency's budgets and performance.

Radical changes in human resource management are not necessary to shift our focus to outcome performance, and innovative management programs currently being introduced do not require dramatic alterations in our labor management relationship. Forcing these changes on the agencies now will only distract them from where their focus should be. It could also inhibit their request for a different approach on human resource issues because now their ideas are complicated or overcome by events as a result of legislated labor reform.

---

[228] GAO, MANAGEMENT REFORM - STATUS OF AGENCY REINVENTION LAB EFFORTS pp. 35-41 (March 1996).

CONCLUSION

The thesis of this paper is that the recommendations of the NPR on labor management relations should not drive our reform of federal labor relations. There is no doubt whatsoever that NPR has had a positive effect on improving governmental services and streamlining the bureaucracy. While reform may be needed as a constitutional lubricant, or it may simply be politics under another name; it is also true that reform is necessary to shake out embedded deadwood and reinvigorate complacent organizations. NPR has been instrumental in doing this. But the thesis still holds, NPR should not be the basis on which we reform our federal labor relationship.

In their 1994 Status Report, NPR had the following quote, "It doesn't make sense when two people are sitting in a boat for one of them to point a finger accusingly at the other and say, 'Your end of the boat is sinking'" The Report then added, "As labor and management increasingly realize, they are in the same boat, needing one another to survive and prosper."[229] There will be dramatic and exciting changes over the next decade as the federal government goes through the upheaval of downsizing and retooling its information and management systems. But success in keeping the boat afloat will not be determined by legislative changes in the scope of bargaining or broad-banding classification; it is going to be determined by the trust that is built between the employees, represented by their unions, and management. It is going to be determined by how openly they can communicate and whether they can express and acknowledge their respective interests.

Trust can be destroyed by either side. There are a number of examples given by unions, where partnership and trust was beginning to change an adversarial relationship, but then the bottom dropped out when the company was sold or the administration changed. But management can have the same problem with unions. This might be the case when management agrees to retain certain employees rather than contract out the jobs at a moneydraining site, and then the union begins a campaign demanding more and better benefits for these same employees. Any reform of the labor relationship must recognize that the unions are not united in their acceptance of partnership and cooperation and that the personalities of the representatives is sometimes more

[229] NPR, *supra*, note 226 at p. 40.

important than any government statute or program. The labor relations system we developed in the United States and in the Federal government is an adversarial system by its nature. Labor and management will often have different interests when bargaining over the budget and organizational priorities. No proposed integration of partnership councils into the Federal bureaucracy is going to change that fact. This leaves us with having to decide how to resolve these inevitable disputes.

Perhaps the entire system does need to be rethought. Limiting ourselves to the language of §7106(b)(1) and arguing over whether these subjects should be permissive or mandatory subjects of bargaining does not seem to make for a productive reform process. As discussed above, it is short-sighted and ignores the long-term consequences. The real question is should management be allowed to preserve its determination of the budget and organizational priorities, and if so how should this be done? The same question can be asked of any other management right listed in §7106, but the budget and the mission priorities involve the issue of "public interest" and implicate those reasons for the very being of the public organization.

These questions are not easily answered by looking at customer satisfaction surveys or antedotes about taking the timeclocks out of the workplace. The satisfaction of the customer being surveyed usually has no rational relationship to the taxpayers' satisfaction with the agency, and neither may have anything to do with why the agency was established in the first place. And as for timeclocks, they may be coming out of the Dept of Labor, they are being put in at Congress because the employees want to be sure they are paid for their overtime.

Considering the current political climate it is unlikely that the 1994 recommendations of the NPC will be enacted, but the administration will propose a less ambitious reform using the same ideas. The problem with enacting Executive Order 12871 into law is that it does shift the advantage in negotiations without understanding the reasons underlying §7106, or understanding the consequences on the various agencies who would rather have the flexibility to continue partnership dialogue, but now find they are forced to negotiate issues they are not prepared to address with a union who no longer believes partnership is necessary. If broad banding classification is enacted, the agencies must be protected from having to negotiate the implementation of this classification system. The evidence concerning the system is mixed at best, and it does show increased salary costs and difficult implementation. Proposals concerning

incentive pay programs also need rethinking about their impact on the budget and mission priorities, and also the employees' incentive to perpetuate the incentives programs or manipulate budgets and baseline figures. In private industry, sharing the profits is something that can hopefully be anticipated each year; but in public agencies, last year's profit means just that much less in the budget next year, especially when budgets are being cut all around.

The Federal labor-management relationship can use some reform. The Authority's innovative intervention program to target frequent filers of ULP is productive and should be applauded, but it doesn't change any fundamental relationships. While trust may be the determinative factor in keeping the boat afloat, certainty in their relationship and in their rights and obligations will also prevent them from accusing each other for not doing their part. The proposals of the NPR, NPC, and OPM legislation will not instill certainty in federal labor relations. In fact, they bring uncertainty, which will be further exasperated by caselaw and policies that either shift or do not address the real issues. Introducing the "good government" standard adds nothing to the Statute but an opportunity for argument and confusion. Maintaining the agency's right to determine organization and manning as a core management function, but then require interest arbitration over the number, types, and grades of employees or positions assigned to any organizational subdivision is absurd.

If there is any reform of the Federal Service Labor-Management Statute it should be an independent project, separate from the NPR, or its creations and recommendations. There are real problems existing in the federal government. We should be more concerned with the shadow government we are creating as we continue to downsize, and the waste and fraud existing in that behemoth which gobbles the vast majority of the federal budget. No politician ever lose an election for bashing the federal bureaucracy. That's unfortunate because it forces the incumbents to indict the system, whether it deserves the blame or not, and to institute reform programs with great fanfare for political reasons. The truth is the bureaucracy evolves over time. The Federal government was changing before NPR was instituted, trying to use private sector innovations, like TQM and partnership. NPR has speeded up the process in many ways, but the headlong rush to reform should not propel us to change our federal labor relations based on NPR.

BIBILIOGRAPHY
(footnotes in parentheses following the title)
(arranged most recent to most dated)

BOOKS

D. KETTL AND J. DIIULIO, JR., INSIDE THE REINVENTION MACHINE: APPRAISING GOVERNMENTAL REFORM (1995).
Kettl (2,58,59,85,204,206,216) *Ban (30,55,66,77)* *Foreman (57)*

PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY (1995).
(62, 81, 146)

PETER BROIDA, A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW AND PRACTICE (1995). *(106, 157, 158, 175)*

D. KETTL, REINVENTING GOVERNMENT: APPRAISING THE NATIONAL PERFORMANCE REVIEW (1994).

S. ARONOWITZ & W. DIFAZIO, THE JOBLESS FUTURE (1994). *(171)*

R. JOHNSON AND G. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY: THE ECONOMICS AND POLITICS OF INSTITUTIONAL CHANGE (1994). *(62, 67, 144)*

BRENDAN MARTIN, IN THE PUBLIC INTEREST?: PRIVATIZATION AND PUBLIC SECTOR REFORM (1993) *(171)*

J.J. DIIULIO, JR., G. GARVEY, & D.F. KETTL, IMPROVING GOVERNMENT PERFORMANCE: AN OWNER'S MANUAL (1993).

WOLLETT, GRON AND WEISBERGER, COLLECTIVE BARGAINING IN THE PUBLIC SECTOR (4th ed. 1993). *(103)*

MARK L. GOLDSTEIN, AMERICA'S HOLLOW GOVERNMENT : HOW WASH. HAS FAILED THE PEOPLE (1992). *(62, 81, 160)*

D. OSBORNE AND T. GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992). *(6-10)*

R. STILLMAN II AND F. MOSCHER, THE AMERICAN CONSTITUTION AND THE ADMINISTRATIVE STATE: CONSTITUTIONALISM IN THE LATE 20TH CENTURY (1989). *GARNETT (42, 61); NEWLAND (62, 161).*

JEAN J. COUTURIER, PUBLIC SECTOR BARGAINING: CIVIL SERVICE, POLITICS, AND THE RULE OF LAW: THE EVOLVING PROCESS-COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT (1985). *(13, 15)*

MAGAZINES AND SELECTED ESSAYS

RONALD SANDERS AND JAMES THOMPSON, *The Reinvention Revolution*, GOVERMENT EXECUTIVE, Reinvention Insert, (March 1996). *(45)*

KATHERINE M. PETERS, *The Hard Sell*, GOVERNMENT EXECUTIVE 20 (Feb. 1996). *(199)*

CATHIE M. LANE, *Bittersweet Partnerships*, GOVERNMENT EXECUTIVE p. 41 (Feb 1996). *(96)*

DAVID HORNESTAY, *Partnership Pays*, GOVERNMENT EXECUTIVE p. 43 (Feb. 1996). *(51, 52)*

Clinton Limits Executive Bonuses, GOVERNMENT EXECUTIVE, p. 6 (Dec. 1995). *(151)*

DENNIS DALEY, *Pay-for-Performance and the Senior Executive Service: Attitudes About the Success of Civil Service reform*, AM. REV. PUB. ADMIN. 355 (Dec 1, 1995). *(109)*

STEPHEN CONDREY, *Reforming Human Resource Management Systems: Exploring the Importance of Organizational Trust*, AMER. REV. OF PUB. ADMIN. 341 (Dec. 1, 1995)

CHRISTOPHER FOREMAN, JR., *Reinventing Capital Hill?*, THE BROOKINGS REVIEW, p. 35 (Winter 1995). *(57)*

MARICK F. MASTERS AND ROBERT S. ATKIN, *Bargaining, Financial, and Political Bases of Federal Sector Unions*, REV. OF PUB. PERS. ADM. 5, 12-14 (Winter 1995). *(66)*

HINDY SCHACHTER, *Reinventing Government or Reinventing Ourselves: Two Models for Improving Government Performance*, 55 PUBLIC ADMINISTRATION REVIEW 530 (Nov/Dec 1995).

MESCH, PERRY, WISE, *Bureaucratic and Strategic Human Resource Management: An Empirical Comparison in the Federal Government*, 5 JOURNAL OF PUB. ADM. RESEARCH AND THEORY, p. 385 (Oct. 1995). *(9)*

ALLAN HOLMES, *Reform Trickles In*, GOVERNMENT EXECUTIVE, 46, 47 (October 1995). *(38)*

PERI E. ARNOLD, *Reform's Changing Role*, PUBLIC ADMINISTRATION REVIEW, p. 407 (Sep/Oct 1995). *(58, 63)*

MALCOLM HOLMES AND DAVID SHANE, *Management Reform: Some Pratitioner Perspectives on the Past Ten Years*, 8 GOVERANANCE 551 (OCT 1995).

BRIAN J. COOK, *Book Review*, AMER. POL. SCIEN. REV. 763 (Sep 1995). *(67)*

PAUL C. LIGHT, *A Bright Spot in the House*, GOVERNMENT EXECUTIVE 6 (Sep. 1995).

JAMES L. SUNDQUIST, *The Concept of Governmental Management: Or, What's Missing in the Gore Report*, 55 PUBLIC ADMINISTRATION REVIEW 398 (Jul/Aug 1995). *(213)*

ROBERT D. BEHN, *The Big Questions of Public Management*, 55 PUBLIC ADMINISTRATION REVIEW 302 (Jul/Aug 1995).

GREGORY B. LEWIS AND SAMANTHA L. DURST, *Will Locality Pay Solve Recruitment and Retention Problems in the Federal Civil Service*? 55 PUBLIC ADMINISTRATION REVIEW 371 (Jul/Aug 1995). *(145)*

JAMES THOMPSON, *Eureka?* GOVERNMENT EXECUTIVE. 31 (Jun 1995).

JAMES THOMPSON AND VERNON JONES, *Reinventing the Federal Government: The Role of Theory in Reform Implementation*, 25 AMERICAN REVIEW OF PUBLIC ADMINISTRATION 183 (Jun 1995). *(58)*

JAMES D. CARROLL, *The Rhetoric of Reform and Political Reality in the National Performance Review*, 55 PUBLIC ADMINISTRATION REVIEW 302 (May/Jun 1995). *(2, 59, 83, 215)*

DAVID H. ROSENBLOOM, *The Context of Management Reform*, 24 THE PUBLIC MANAGER 3 (Spring 1995). *(76)*

VICTOR J. KIMM, *GPRA: Early Implementation*, 24 THE PUBLIC MANAGER 11 (Spring 1995). *(227)*

RICHARD P. NATHAN, *Reinventing Government: What Does It Mean?*, 55 PUBLIC ADMINISTRATION REVIEW 213 (Mar/Apr 1995).

WILLIAM MILLER, *Reinventing Government: The Ultimate Management Challenge*, INDUSTRY WEEK 65 (NOV. 7, 1994).

JONATHAN WALTERS, *The Reinvention of the Labor Leader*, GOVERNING 44 (Nov 1994).

PAUL LIGHT, *Surviving Reinvention*, GOVERNMENT EXECUTIVE, 55 (Jun 1994). *(210)*

ROB GURWITT, *Entrepreneurial Government: The Morning After*, GOVERNING 34 (May 1994). *(208, 209, 214)*

BARTON WECHSLER, *Reinventing Florida's Civil Service System: The Failure of Reform*, REVIEW OF PUBLIC PERSONNEL ADMINISTRATION, 64 (Spring 1994). *(211, 212)*

RONALD C. MOE, *The 'Reinventing Government' Exercise: Misinterpreting the Problem, Misjudging the Consequences*, PUBLIC ADMINISTRATION REVIEW, 111 (Mar/Apr 1994). *(60, 78)*

E. SAM OVERMAN AND KATHY J. BOYD, *Best Practice Research and Postbureaucractic Reform*, JOURNAL OF PUBLIC ADMINISTRATION RESEARCH AND THEORY, 67 (Jan 1994). *(216)*

DAVID H. ROSENBLOOM, *Editorial: Have an Administrative Rx? Don't Forget the Politics!*, 53 PUB. ADMIN. REV., 503 (Nov/Dec 1993)

MIKE PARKER AND JANE SLAUGHTER, *Labor-Management Partnerships Are Harmful* in WORK: OPPOSING VIEWPOINTS, 146, 152, (1993). *(69)*

LINDA THORNBURG, *Can Employee Participation Really Work?*, HRMAGAZINE, 48 (Nov 1993). *(50)*

ROBERT W. MILLER AND FREDRICK N. PRICHARD, *Factors Associated with Workers' Inclination to Participate in an Employee Involvement Program*, GROUP AND ORGANIZATION MANAGEMENT, 414 (Dec 1992). *(50)*

WILLIAM COOKE, *Product Quality Improvement Through Employee Participation: The Effects of Unionization and Joint Union-Management Administration*, INDUSTRIAL AND LABOR RELATIONS REVIEW, 119 (Oct 1992). *(50)*

BENNETT HARRISON, *The Failure of Worker Participation*, TECHNOLOGY REVIEW, 74 (Jan. 1991). *(50)*

DONALD F. PARKER, SUSAN J. SCHURMAN, AND B. RUTH MONTGOMERY, *Labor-Management Relations Under CSRA: Provisions and Effects* in LEGISLATING BUREAUCRATIC CHANGE: THE CIVIL SERVICE REFORM ACT OF 1978, 161 (1984). *(22)*

LAW REVIEWS

A. MICHAEL FROOMKIN, *Reinventing The Government Corporation*, 1995 U.ILL.L.REV. 543 (1995). *(202)*

PAUL VERKUIL, *Is Efficient Government An Oxymoron?*, 43 DUKE L. REV. 1221 (1994).

LTC RICHARD T. DAWSON AND LTC W. KIRK UNDERWOOD, *Overview of Labor Management Relations in the Air Force*, 35 A.F.L.REV. 1 (1991). *(13)*

MICHAEL R. MCMILLIAN, *Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?*, 127 MIL.L.REV 169 (1990). *(13)*

SMITH, *State and Local Advisory Reports On Public Sector Employment Labor Legislation : A Comparative Analysis*, 67 MICH. L. REV. 891 (1969).*(90)*

WOLLETT, *The Bargaining Process In The Public Sector: What Is Bargainable?*, 51 ORE. L. REV. 177 (1977). *(91)*

NEWSPAPER AND PERIODIC REPORTERS

STEPHEN BARR, *OPM, in a First, Acts to Convert an Operation Into Private Firm*, THE WASH. POST, p. A-4 (April 14, 1996).*(196, 198)*

_____, *Clinton Plan To Set 3% Pay Raise*, THE WASH. POST, pp.A-1, A-4, col. 1 (Feb. 3, 1996). *(152)*

_____, *Export-Import Bank Overpaid Salaries*, THE WASH. POST, A-19, Col.4 (Feb. 1, 1996). *(149)*

MIKE CAUSEY, *A Suit That Doesn't Fit?*, THE WASH. POST, Feb. 5, 1996, p. B-2, col. 1. *(69, 150)*

_____, *The Pension Pit*, THE WASH. POST, Mar. 1, 1996, at C-2, col. 1. *(89)*

_____, *Private Pleasures*, THE WASH. POST, Mar. 3, 1996, at B-2, col. 1. *(70)*

_____, *Special Pay Packages*, THE WASH. POST, March 29, 1996, B-2, col. 1. *(150)*

_____, *the Federal Diary*, THE WASH. POST, March 31, 1996, B-2, col. 1. *(153)*

_____, *Super-Safe vs. High Return*, THE WASH. POST, April 5, 1996, p. B-2, col. 1. *(41)*

_____, *They Know Where You Live*, THE WASH. POST, Apr. 24, 1996, p. D-2, col. 1. *(69)*

BNA, *NTEU Suit Challenges Constitutionality of Recently Signed Line-Item Veto Bill*, 34 GERR 544 (Apr. 15, 1996). *(68, 207)*

_____, *OPM Issues Template To Help Agencies Convert To Performance-Based Systems*, 34 GERR 513 (Apr. 8, 1996) *(203)*

_____, *Administration Awards $14.5 Million For Displaced Workers At Kelly Air Base*, 34 GERR 513 (Apr. 8, 1996) *(189)*

_____, *DOD Asks Congress To Eliminate Split In Depot Level Maintenance*, 34 GERR 513 (Apr. 8, 1996). *(187)*

_____, *Privatization: AFGE Suit Alleges That Privatization of Air Force Base Functions is Illegal*, 34 GERR 420 (Mar. 25, 1996). *(184)*

_____, *Cooperation: Gore Gives First Partnership Awards to Federal Unions and Four Services*, 34 GERR 243 (Feb. 19, 1996). *(46)*

_____, *Targeting Frequent Filers Reduced Unfair Practice Charges, FLRA Says*, 34 GERR 242 (Feb 19, 1996). *(53)*

INSTITUTIONAL AUTHORS

NPR

NATIONAL PERFORMANCE REVIEW, COMMON SENSE GOVERNMENT: WORKS BETTER & COSTS LESS, THIRD REPORT OF THE NPR (Sep. 1995).

_____, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: STATUS REPORT (Sep. 1994). *(47, 48, 226, 229)*

_____, PUTTING CUSTOMERS FIRST: STANDARDS FOR SERVING THE AMERICAN PEOPLE (Sep. 1994).

_____, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS, (Sep. 1993). *(1, 5, 12, 23, 26, 27)*

_____, REINVENTING HUMAN RESOURCE MANAGEMENT, ACCOMPANYING REPORT OF NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS. (Sep. 1993). *(25, 104, 105, 142)*

NPR and OMB, PRIVATIZATION RESOURCE GUIDE AND STATUS REPORT, (Feb. 13, 1995). *(165-170, 200)*

NPC

NATIONAL PARTNERSHIP COUNCIL, NATIONAL PARTNERSHIP COUNCIL 1994 ASSESSMENT OF PARTNERSHIP ACTIVITIES (Feb. 13, 1995). *(65)*

_____, A REPORT TO THE PRESIDENT ON IMPLEMENTING RECOMMENDATIONS OF THE NATIONAL PERFORMANCE REVIEW (Jan. 1994). *(29, 31-33, 40, 65, 92, 173)*

GAO

GENERAL ACCOUNTING OFFICE, MANAGEMENT REFORM - STATUS OF AGENCY REINVENTION LAB EFFORTS (March 1996)(GAO/GGD-96-69). *(44,54,228)*

_____, CLOSING MAINTENANCE DEPOTS: SAVINGS, WORKLOADS, AND REDISTRIBUTION (MAR 1996) (NSIAD-96-29)

_____, DEPOT MAINTENANCE: OPPORTUNITIES TO PRIVATIZE REPAIR OF MILITARY ENGINES (MAR 1996) (GAO/NSIAD-96-33)

_____, TRANSFORMING THE CIVIL SERVICE: BUILDING THE WORKFORCE OF THE FUTURE (Dec 1995)(GGD-96-35)

_____, FEDERAL PERSONNEL: FEDERAL/PRIVATE SECTOR PAY COMPARISONS (Chapter Report, 12/14/94, GAO/OCE-95-1). *(154)*

_____, OFFICE OF MANAGEMENT AND BUDGET - CHANGES RESULTING FROM THE OMB 2000 REORGANIZATION (Dec 1995)(GGD/AIMD-96-50). *(86, 87)*

_____, RETENTION ALLOWANCES: USAGE AND COMPLIANCE VARY AMONG FEDERAL AGENCIES (Dec 1995) (GGD-96-2). *(148)*

_____, FEDERAL JOB CLASSIFICATION: COMPARISON OF JOB CONTENT WITH GRADES ASSIGNED IN SELECTED OCCUPATIONS (Letter Report, 10/95, GAO/GGD-96-20). *(147)*

_____, MANAGING FOR RESULTS: EXPERIENCES ABROAD SUGGEST INSIGHTS FOR FEDERAL MANAGEMENT REFORM (May 1995)(GGD-95-120).

_____, MANAGING FOR RESULTS: STATE EXPERIENCES PROVIDE INSIGHTS FOR FEDERAL MANAGEMENT REFORM (Dec 1994)(GGD-95-22).

_____, REENGINEERING ORGANIZATIONS: RESULTS OF A GAO SYMPOSIUM (Dec. 1994) (GAO/NSIAD-95-34).

_____, MANAGEMENT REFORM: IMPLEMENTATION OF THE NATIONAL PERFORMANCE REVIEW'S RECOMMENDATIONS (Dec. 1994) (GAO/OCG-95-1). *(57, 71, 155)*

_____, MANAGEMENT REFORM: GAO'S COMMENTS ON THE NATIONAL PERFORMANCE REVIEW'S RECOMMENDATIONS (Dec. 1993) (GAO/OCG-94-1). *(155)*

OMB

Office of Management and Budget, MB, OMB Circular No. A-76, "Performance of Commercial Activities." (Aug 4, 1983)(published at Federal Register 37110-37116. (Aug. 16, 1983). *(178, 181)*

_____, Notice of Revised Supplemental Handbook, Performance of Commercial Activities, OMB Circular No. A-76, 61 FR 14338, (Apr. 1, 1996). *(191-195)*

MISC

OFFICE OF PERSONNEL MANAGEMENT, ACCOMPANYING REPORT OF NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS, (Sep. 1993). (JK421.N372).

_____, FEDERAL CIVILIAN WORKFORCE STATISTICS: EMPLOYMENT AND TRENDS AS OF SEPTEMBER 1995 *(64)*

_____, Revised 5 CFR Parts 430, 451, 60 FR 43936, Aug. 23, 1995, eff. Sep. 22, 1995. *(112)*

FLRA GENERAL COUNSEL, MEMORANDUM TO FLRA REGIONAL DIRECTORS (AUG. 8, 1995). *(221, 222)*

CONGRESSIONAL MATERIAL

COMMITTEE PRINTS

CONGRESSIONAL RESEARCH SERVICE LIBRARY OF CONGRESS TO THE JOINT COMM. ON THE ORGANIZATION OF THE CONGRESS, 103D CONG., 1ST SESS., CONGRESSIONAL REORGANIZATION: OPTIONS FOR CHANGE (Joint Committee Print 1993).

MAJORITY STAFF REPORT TO THE COMM. ON GOVERNMENT OPERATIONS, 102D CONG., 2D SESS., MANAGING THE FEDERAL GOVERNMENT: A DECADE OF DECLINE (Committee Print 1993).

COMMITTEE HEARINGS

Committee on Government Reform and Oversight

The Federal Role in Privatization, Hearings Before the Subcommittee on Government Management, Information, and Technology of the Comm. on Government Reform and Oversight, 104th Cong., 1st Sess. (1995). (0-16-047296-2; KF27.G75 1995A).

GAO, Prepared Statement of Charles A. Bowsher, Comptroller General of the United States, *Governemnt Reform: GAO's Comments on the National Performance Review*, May 2, 1995 (GAO/T-GGD-95-154).

GAO, Prepared Statement of Nancy Kingsbury, Director, Federal Human Resource Management Issues, *Federal Downsizing: The Administration's Management of Workforce Reductions*, Mar. 2, 1995 (GAO/T-GGD-95-108).

GAO, Prepared Statement of Johnny C. Finch, Asst. Comptroller General, and Gene L. Dodar, Asst. Comptroller General, *Managing for Results: Steps for Strengthening Federal Management*, May 9, 1995 (GAO/T-GGD/AIMD-95-158).

GAO, Prepared Statement of Johnny C. Finch, Asst. Comptroller General, *Managing for Results: Status of the Government Performance and Results Act*, June 27, 1995 (GAO/T-GGD-95-193).

Committee on Government Operations

Managing the Federal Government: A Decade of Decline, Majority Staff Report to the Committee on Government Operations, 102d Cong., 2d Sess. (1992). (ISBN 0-16-039875-4; JK421.M363 1993).

Government Performance and Results Act of 1993, Hearings on H.R. 826 before the Legislation and National Subcommittee of the Committee on Government Operations, 103d Cong., 1st Sess. (1994). (ISBN 0-16-043549-8; KF27.G668 1993H).

Strengthening Public and Fiscal Accountability: Implementation of the Chief Financial Officer's Act of 1990, Hearings before the Legislation and National Subcommittee of the Committee on Government Operations, 103d Cong., 2d Sess. (1994). 0-16-047117-6; KF27.G668 1994K)

Committee on Governmental Affairs

Government Reform and Savings Act, Hearing on H.R. 3400 Before the Committee on Governmental Affairs, 103d Cong., 1st Session (February 23, 1994)

Making Government Work: OMB's Plan, Hearing Before the Committee on Governmental Affairs, 103d Cong., 2d Session (February 3, 1994). (0-16-046747-0; KF26.G75 1994AA)

Reforming Government: What Really Needs To Be Done?, Hearing Before the Committee on Governmental Affairs, 103d Cong., 2d Session (January 27, 1994). (0-16-046341-6; KF26.G75 1994J)

The Federal Employee Fairness Act, Hearing on S. 404 Before the Committee on Governmental Affairs, 103d Cong., 1st Session (May 26, 1993).

Improving Governmment Organization and Performance, Hearing Before the Committee on Governmental Affairs, 103d Cong., 1st Session (March 11, 1993) (0-16-043583-8; KF26.G75 1993S)

GAO, Prepared Statement of Charles A. Bowsher, Comptroller General of the United States, *Managing For Results: Achieving GPRA's Objectives Requires Strong Congressional Role*, Mar. 6, 1996 (GAO/T-GGD-96-79).

GAO, Prepared Statement of Charles A. Bowsher, Comptroller General of the United States, *Governemnt Reorganization: Issues and Principles*, May 17, 1995 (GAO/T-GGD/AIMD-95-166).

LEGISLATION

GOVERNMENT MANAGEMENT REFORM ACT OF 1994, Pub.L. 103-356, 108 Stat 3410, Oct. 13, 1994.

SOCIAL SECURITY INDEPENDENCE AND PROGRAM IMPROVEMENT ACT OF 1994, Pub. L. 103-296 §108(j)(1), 108 Stat 1464, Aug, 15, 1994.

FEDERAL WORKFORCE RESTRUCTURING ACT OF 1994, Pub.L. 103-226, 108 Stat. 111, Mar 30, 1994.

GOVERNMENT PERFORMANCE AND RESULTS ACT OF 1993, Pub.L. 103-62, 107 Stat 285, August 3, 1993.

CHIEF FINANCIAL OFFICERS ACT OF 1990, Pub. L. 101-576, 104 Stat 2838, Nov. 15, 1990.

EXECUTIVE ORDERS

Executive Order 12871, 58 FR 52201 (Oct 1, 1993). (Its original 2 year term was extended to 1997 by E.O. 12974,60 FR 51875 (Sep 29, 1995). Its membership was amended by E.O. 12983, 60 FR 66855 (Dec 21, 1995)). *(28, 34, 35, 98-103)*

CASES

Federal Courts

AFGE v. Clinton, DC-S Ohio, Eastern Div, No. C2 96-0283, 3/18/96 *(68, 184)*
NTEU v. U.S., DC DC, No. 96-624, filed Apr. 9, 1996 *(68, 207)*
NTEU v. FLRA, 30 F.3d 1510 (D.C. Cir. 1994). *(107)*
Asso. of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA, 22 F.3d 1150, 1155 (D.C.Cir.1994). *(100)*
Dept. of Veterans Affairs v. FLRA, 3 F.3d 1386 (10th Cir. 1993). *(219)*
IRS v. FLRA, 996 F.2d 1246, 1248 (D.C. Cir 1993). *(179)*
Social Security Admin. v. FLRA, 983 F.2d 578 (4th Cir. 1992), *reversing in part*, 41 FLRA 224 (1991) *(123)*
Dept. of Army, Red River Depot v. FLRA, 977 F.2d 1490 (D.C. Cir. 1992), *on remand, NAGE Local R14-52 and Dept of Army, Red River Depot*, 48 FLRA 1198 (1993). *(49)*
Dept. of Treasury, IRS v. FLRA, 110 S.Ct. 1623 (1990). *(176)*
Langley Air Force Base v. FLRA, 878 F.2d 1430 (Table, Case No. 88-2171), 146 L.R.R.M. (BNA) 3088, 1989 WL 74869 (1989) *(125 - 127)*
NTEU v. FLRA, 793 F.2d 371 (D.C. Cir 1986), *reversing, NTEU and IRS*, 14 FLRA 463 (1984). *(119)*

Federal Labor Relations Authority

FAA, Little Rock and NATCA, 51 FLRA No. 86 (Mar. 29, 1996) *(37)*
FAA, Little Rock, and NATCA, 51 FLRA 216, 51 FLRA No. 24 (1995) *(37)*
AFGE and OPM, 51 FLRA 491, 51 FLRA No. 42 (1995). *(140)*
NAGE and Veterans Affairs Med Ctr, Lexington, Kentucky, 51 FLRA 386, 51 FLRA No. 36 (1995). *(99,101)*
IAMAW and U.S. Dept. of Treasury, 50 FLRA 677, 50 FLRA No. 87 (1995), *on remand from, U.S. Department of the Treasury, Bureau of Engraving and Printing v. FLRA*, 995 F.2d 301 (D.C.Cir.1993). *(106, 142)*
GSA and NFFE, 50 FLRA 136, 50 FLRA No. 28 (1995) *(37)*
NFFE and Dept of the Army, Rock Island Arsenal Rock Island, 49 FLRA 151, 49 FLRA No. 21, (1994) *(37)*
NAGE Local R14-52 and Dept of Army, Red River Depot, 48 FLRA 1198 (1993). *(123, 129-134)*
NFFE and USDA, FCIC, 48 FLRA 552, 48 FLRA No. 54 (1993) *(121)*
AFGE Local 1345 and Dept. of Army, Ft. Carson, 48 FLRA 168 (1993). *(177, 180)*
NTEU and. NRC, 47 FLRA 980 (1993). *(135-139)*
AFAFC, Lowry AFB, Denver Colorado, 42 FLRA No. 85, 42 FLRA 1226 (1991). *(221)*
Dept Of Navy, Pearl Harbor Naval Shipyard, 29 FLRA No. 96, 29 F.L.R.A. 1236 (1987). *(221)*
NTEU and IRS, 27 FLRA 132 (1987). *(118)*
FDIC and NTEU, 18 FLRA 768 (1985). *(98)*
AFGE and AFMC, Wright-Patterson AFB, 2 FLRA 604 (1980). *(128)*
Veterans Admin. Hosp., Muskogee, Oklahoma, A/SLMR No. 301, 3A/SLMR 491 (1978). *(43)*
DLA, Defense Depot, Tracy, California And Laborers' Intl. Union Of North America., Local 1276, AFL-CIO , FLRA ALJ Dec. Rep. No. 25, 1982 WL 23451 (Dec. 28, 1982). *(220)*